Supreme Court, U.S.
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No. ___

In The

Supreme Court of the United States

October Term, 1988

STEPHEN TRAITZ, JR., ROBERT CROSLEY, MICHAEL DALY, MICHAEL MANGINI, MARK OSBORN, STEPHEN TRAITZ, III, JOSEPH TRAITZ, RICHARD SHOENBERGER, ROBERT MEDINA, DANIEL J. CANNON, ERNEST WILLIAMS, EDWARD HURST, JAMES NUZZI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Fourth Amendment require suppression of communications intercepted pursuant to a seven-page order that was missing page three, was not read by the judge who signed it, and was either not read or its deficiency ignored by the government agents who executed it?

2. Whether an interception order that is missing a page containing a substantial part of the decretal paragraph is an "order . . . insufficient on its face," 18 U.S.C. § 2518(10)(a)(ii), requiring suppression of the intercepted communications?

3. Whether the courts below erred in looking to the contents of the application and supporting affidavit to determine if the interception order was sufficient "on its face"?

4. Whether an interception order signed but not read by the judge establishes that he "serve[d] merely as a rubber stamp for the police," *United States v. Ventresca*, 380 U.S. 102, 109 (1965), in violation of the Fourth Amendment?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were the same as in the caption.

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on March 22, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 871 F.2d 368 (3d Cir. 1989)

and is reprinted in the Appendix at App. 1. The opinion of the United States District Court for the Eastern District of Pennsylvania, which is unreported, is reprinted at App. 75.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, affirming the judgments of conviction of the United States District Court for the Eastern District of Pennsylvania, was entered on March 22, 1989. A timely petition for rehearing was denied on April 21, 1989. (App. 169) This petition for certiorari is filed within 60 days of the date of that order in compliance with Rules 20.1 and 20.2. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 18, United States Code:

Section 2518. [Reprinted in Appendix at App. 171.]

STATEMENT OF THE CASE

Petitioners are officers or agents of Roofers Union Local 30/30B, Philadelphia, Pennsylvania. Following a federal jury trial, they were convicted of a variety of union-related crimes. The principal evidence against them were tape-recorded conversations intercepted through listening devices planted in the offices of the local.

By order dated September 23, 1985, United States District Judge James T. Giles, based on an application supported by the affidavit of an FBI agent, authorized electronic surveillance of the local's offices pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Successive thirty-day extensions of the electronic surveillance were authorized by the district court in October, November and December, 1985, and in January, 1986. It is the extension granted in October that is at issue in this petition.

Title 18 U.S.C. § 2518(5) permits extensions of an order authorizing electronic surveillance when, upon proper application, the court makes findings required by § 2518(3) that:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular [enumerated] offense . . . ;
>
> (b) there is probable cause that particular communications concerning that offense will be obtained through such interception;
>
> (c) normal investigative techniques have been tried and have failed or reasonably appear to be unlikely to succeed or to be too dangerous;

> (d) . . . there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense. . . .

On October 24, 1985, at 9:05 a.m., in response to an application supported by another affidavit of the FBI agent, sworn to the same date, Judge Giles signed a document entitled "order," under color of which an additional 30 days of electronic surveillance was conducted. The judge signed the document on page seven, but it was missing a page, page three, when he signed it and when it issued. Page three was missing not only from the original document but also from the Government's copies. The document actually contained only six pages, numbered 1, 2, 4, 5, 6 and 7. The text at the bottom of page two did not connect intelligibly with the text at the top of page four, indicating to even a casual reader that material was missing. Necessarily then, the judge could not have read the "order" before signing it and the FBI agents either did not read the "order" before executing it or ignored what was an obvious defect in it.

On page one, the "order" states that "the Court finds that:" and there follows a finding, which carries over to page two, that there is probable cause for belief that a number of the petitioners are committing the enumerated offenses referred to in 18 U.S.C. § 2518(3)(a). On page two there begins a finding related to probable cause for belief that communications concerning those offenses will be obtained through the requested interception, as required by 18 U.S.C. § 2518(3)(b). Page two ends with the following partial sentence:

> In particular, these oral communications will concern the identities of the victims of the alleged extortionate credit transactions, racketeering activity, prohibited gambling enterprises, amounts extorted, terms of the

The next page, numbered 4, begins with the following partial sentence:

> Assistant Attorney General, Criminal Division, United States Department of Justice, who has been specifically designated by the Attorney General of the United States to exercise the power conferred upon him by Section 2516, Title 18, United States Code do the following:

By reference to the subsequent, complete extension orders, the missing text may be surmised to have been substantially as follows:

> the extortion, the amounts used in the gambling enterprises and the manner in which the proceeds from these illegal activities will be distributed, the identities of the persons who share the proceeds of such activities and racketeering activity and the identities of unknown individuals who are involved in the above-described illegal activities with Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi, Robert Medina, Robert Crosley, Richard Schoenberger, Joseph Traitz, Edward Hurst and Thomas Brown. Additionally, the oral communications are expected to include the admissible evidence of the commission of the above-described offenses.
>
> (c) Normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if tried, to develop sufficient evidence for prosecution of the above-described offenses.

> (d) There is probable cause to believe that the Business Manager's Office and the Business Agent's Meeting Room of Roofer's Local 30 Union Hall, located at 6447 Torresdale Avenue, Philadelphia, Pennsylvania, will be used by Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi, Robert Medina, Robert Crosley, Richard Schoenberger, Joseph Traitz, Edward Hurst and Thomas Brown and others as yet unknown in connection with the commission of the above-described offenses.
>
> Wherefore, it is on this 24th day of October, 1985,
>
> ORDERED that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized pursuant to the application provided by the Honorable Steven S. Trott,

Thus the "order" was missing not only the requisite findings that normal investigative techniques would be futile or too dangerous, *see* 18 U.S.C. § 2518(3)(c), and that there was probable cause to believe that the local's offices were being used in connection with the enumerated offenses, *see* 18 U.S.C. § 2518(3)(d), but was missing the quintessential *ordering* language: "Wherefore, it is on this 24th day of October, 1985, ORDERED that special agents of the Federal Bureau of Investigation . . . are authorized. . . ."

Prior to trial, petitioners moved to suppress the intercepted oral communications on the basis of 18 U.S.C. § 2518(10)(a)(ii), which requires suppression of such evidence when "the order of authorization or approval under which it was intercepted is insufficient on its face."

The District Court, in a 99-page opinion by Judge Giles, denied the motion to suppress, concluding that the findings statutorily mandated in 18 U.S.C. § 2518(3) need

not be in writing, because the signature of the judge on the issuing order evidences that he has made those findings. (App. 123) Moreover, in determining the sufficiency of the order, the application and supporting affidavit must also be considered. (App. 124) The court noted that the order states that "[a]pplication having been made before me by Richard L. Scheff, Assistant United States Attorney . . . and full consideration having been given to the matter set forth therein. . . ." (App. 125) Thus, "the order incorporates the application and necessarily incorporates the affidavit of [the FBI agent]." (App. 125) Since the application and affidavit conformed to the statutory requirements, held the court, it is reasonable to conclude that an order entered after consideration of those materials meets the requirements of 18 U.S.C. § 2518(3) without a written finding. (App. 127) Nowhere in its opinion or in the hearing on the motion did the court deny that it had failed to read the order.

In affirming petitioners' convictions, the Court of Appeals agreed that written findings are not required by 18 U.S.C. § 2518(3)(c) and that the judge's act of signing the order is sufficient evidence that he made the requisite findings. (App. 12) The Court of Appeals stated that for confirmation it need only look to the affidavit presented to the district court in support of the Government's application. (App. 13) Addressing petitioners' argument that the missing page indicated that the District Court had not read the "order" before signing it but merely "rubber stamped" the Government's request for electronic surveillance, the Court of Appeals held that it is not the order which must be examined, but the application and

affidavit submitted in support of it. (App. 15) Since nothing in the supporting papers was improper, stated the court, it cannot be concluded that the district court "rubber stamped" the Government's request without exercising its independent judgment. (App. 15)

Neither the District Court nor the Court of Appeals addressed petitioners' argument that the "order" was insufficient on its face because it lacked the indispensable *ordering* language of an order.

REASONS FOR GRANTING THE WRIT

Title 18 U.S.C. § 2518(10)(a)(ii) provides for the suppression of the contents of any wire or oral communication where "the *order* of authorization or approval under which it was intercepted is insufficient *on its face.*" (Emphasis added.) Thus the courts below were wrong to look to the application and supporting affidavit in determining the facial sufficiency of the order purporting to authorize the interception of communications.

While this Court has on many occasions addressed subparagraph (a)(i) of § 2518(10), which provides for suppression of a communication that was "unlawfully intercepted," *see United States v. Donovan*, 429 U.S. 413 (1977); *United States v. Chavez*, 416 U.S. 562 (1974); *United States v. Giordano*, 416 U.S. 505 (1974), only in *Chavez* did the Court discuss subparagraph (a)(ii), which concerns the *facial insufficiency* of an interception order.

Chavez claimed that the interception order in his case was insufficient on its face because it misidentified

Assistant Attorney General Will Wilson as the official authorizing the application, when the Attorney General himself had in fact given the approval. In rejecting Chavez's claim, the Court stated:

> Here, the interception order clearly identified "on its face" Assistant Attorney General Wilson as the person who authorized the application to be made. Under § 2516(1), he properly could give such approval had he been specially designated to do so by the Attorney General, as the order recited. That this has been subsequently shown to be incorrect does not detract from the facial sufficiency of the order. Moreover, *even if we were to look behind the order despite the clear "on its face" language of § 2518(10)(a)(ii)*, it appears that the Attorney General authorized the application, as he also had the power to do under § 2516(1).

416 U.S. at 573-74 (footnote omitted)(emphasis added). The clear implication of the foregoing, as required by the plain language of the statute, is that the facial sufficiency of an interception order is to be determined by reference to the order itself, not to extraneous materials like the application and supporting papers. Thus the analysis of the District Court and the Court of Appeals was misdirected.

The interception order here was insufficient "on its face" for three reasons. First, it was not in fact an "order" because, due to the missing page, it lacked the ordering language that is the essence of an order. An order is a "command or direction authoritatively given." Black's Law Dictionary 988 (5th ed. 1979). Here the order, which omitted the language, "Wherefore, it is on this 24th day of October, 1985, ORDERED that Special Agents of the Federal Bureau of Investigation . . . are authorized . . . ,"

failed to give the essential command or direction. It is difficult to imagine how an order could be more insufficient on its face than to omit a substantial portion of the decretal paragraph.

Second, the order was insufficient on its face for the simple but profound reason that, although signed by the judge, it was obviously missing an entire page. No one reading that order, including the FBI agents who conducted the surveillance pursuant to it, could know the missing page's contents, including whatever limiting language the page might have contained. Even the operative effect of the judge's signature was dubious, because his signature on a patently deficient order indicated that the judge himself had not read the order before signing it.

Third, the order was facially insufficient because it set forth only two of the four findings required by § 2518(3). The decisions of the courts below hinged on the rationale that nothing in the language of the statute compels the judge to set forth the required findings in writing and that the judge's act of signing the order is sufficient evidence that he made those findings. (App. 11-12, 122-23) Whether or not the judge is *compelled* to make written findings in his order is open to dispute. *Compare United States v. Tortorello*, 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir. 1973) ("There is nothing in § 2518(3)(c) which requires that particular words be used in the requisite finding or indeed that the finding be actually expressed in words rather than by an act of the judge")(dictum), *with United States v. Cantu*, 625 F.Supp. 656, 665 (N.D. Fla. 1985), *aff'd sub nom. United States v. Weber*, 808 F.2d 1422 (11th Cir. 1987) ("the reviewing court need only compare the contents of the order with the

requirements of Sections 2518(3) through (5)" (dictum). In any event, here the order *did* set forth such findings, but only two of the required four. Therefore it was facially insufficient.

More importantly, under the facts of this particular case, it is perfectly bizarre to maintain that the judge's act of signing the order is sufficient evidence that he made the requisite findings, when it is apparent that the judge signed the order without reading it. In view of that lapse, it is inappropriate to presume, under a sort of presumption of regularity, that the judge did make the findings.[1] The general presumption that no official will omit anything which his official duty requires to be done is destroyed when there is affirmative evidence of irregularity. *See United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)("presumption [of regularity] is not to shield [official] action from a thorough, probing, in-depth review"). Here, where the evidence of irregularity is indisputable, it can hardly be presumed from the judge's signing of the defective order that he made the required findings which that order failed to recite. Therefore the order was facially insufficient.

Furthermore, since there was no valid basis for presuming that the judge had made the proper findings, the

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[1] In view of the fact that the order was not read before being signed, it is particularly ironic that the District Court, in finding the order sufficient, relied on the order's own statement: "Application having been made before me by Richard L. Scheff, Assistant United States Attorney . . . and full consideration having been given to the matter set forth herein. . . ."

Court of Appeals was also wrong in rejecting petitioners' claim that the judge's failure to read the order indicated that he had impermissibly "rubber stamped" the Government's request for the interception order. *See United States v. Ventresca*, 380 U.S. 102, 109 (1965). In arriving at its conclusion the Court of Appeals asserted: "In examining whether the judge properly performed his function it is not the order which must be examined but rather the application and the affidavit which were submitted in support of the interception order," *citing Ventresca*. (App. 15) That principle may be true where the order or the warrant is proper on its face and it is only by reference to the underlying papers that the correctness of a magistrate's probable cause determination can be assessed. But to ignore a facially defective warrant or order in determining whether the magistrate properly performed his function makes no sense.

First, the warrant or order is, after all, the only direct evidence of the magistrate's act. One would be hard put, for example, to sustain an unsigned or undated warrant, no matter how complete and compelling the application and supporting affidavit were. *See United States v. Lamonge*, 458 F.2d 197, 199 (6th Cir. 1972) (wiretap evidence suppressed because undated order was facially invalid, even though dates were inferrable from file and were added by court *nunc pro tunc*); *United States v. Ceraso*, 355 F. Supp. 126 (M.D. Pa. 1973) (suppressing communication because unsigned interception order was insufficient on its face). Second, while a facially proper warrant or order supports the presumption that the issuing magistrate has reviewed the application and affidavit

and made the requisite determinations, a defective warrant or order, as has been shown, does not support that presumption. To the contrary, where it is evident that a judge has not read the order, that fact provides reason to doubt that he read the application and affidavit. Here, the conclusion that the Government's request for an interception order was "rubber stamped" by the judge is supported by the evidence, while the presumption that he exercised independent judgment after reviewing the application and affidavit is not. Consequently, the Court of Appeals was wrong to rely on the supporting papers and to ignore the defective order.

Since, aside from the requirements of Title III, the interception of oral communications must comply with the Fourth Amendment, *see Katz v. United States*, 389 U.S. 347 (1967); *Berger v. United States*, 388 U.S. 1 (1967), that amendment was violated when the judge signed the interception order without reading it. "[I]ntercept orders issued under Title III . . . , like other warrants, must be subjected to a review which will 'ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police." ' " *United States v. Ford*, 553 F.2d 146, 165-66 (D.C.Cir. 1977) (citations omitted). That the government agents executed the order without reading it, or else ignored the patent defect in it, was a further violation of the Fourth Amendment. Such disdain for the contents of the order makes a mockery of the warrant requirement.

This Court should therefore grant certiorari to determine if 18 U.S.C. § 2518(10)(a)(ii) means what it says in providing for suppression of communications intercepted pursuant to an "order . . . insufficient on its face" and to

determine if such an order violates the Fourth Amendment when signed by a judge who has not read it and executed by agents who either did not read it or ignored its obvious deficiencies.

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit should be granted.

Dated: New York, New York
June 16, 1989

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1048, 1049, 1050, 1055,
1056, 1057, 1058, 1059, 1071, 1152,
1153, 1154, 1155

UNITED STATES OF AMERICA
v.
STEPHEN TRAITZ, JR.

Stephen Traitz, Jr.,
Appellant in No. 88-1048

Robert Crosley,
Appellant in No. 88-1049

Michael Daly,
Appellant in No. 88-1050

Michael Mangini,
Appellant in No. 88-1055

Mark "Buddy" Osborn,
Appellant in No. 88-1056

Stephen Traitz, III,
Appellant in No. 88-1057

Joseph Traitz,
Appellant in No. 88-1058

Richard Shoenberger,
Appellant in No. 88-1059

Robert Medina,
Appellant in No. 88-1071

Daniel J. Cannon,
Appellant in No. 88-1152

Ernest Williams,
Appellant in No. 88-1153

Edward Hurst,
Appellant in No. 88-1154

James Nuzzi,
Appellant in No. 88-1155

Appeal from the United States
District Court for the Eastern
District of Pennsylvania

Criminal Nos. 86-00451-01-13

Argued September 29, 1988

BEFORE: GIBBONS, *Chief Judge*,
SEITZ, *Circuit Judge*,
and
FARNAN, *District Judge**

(Filed: March 22, 1989)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

On October 23, 1986, appellants Stephen Traitz, Jr. ("Traitz, Jr."), Edward P. Hurst ("Hurst"), Michael Mangini ("Mangini"), Robert Crosley ("Crosley"), Michael Daly ("Daly"), Daniel Cannon ("Cannon"), Mark Osborn ("Osborn"), Robert Medina ("Medina"), Ernest Williams ("Williams"), James Nuzzi ("Nuzzi"), Stephen Traitz, III ("Traitz, III"), Joseph Traitz ("Traitz"), Richard Schoenberger ("Schoenberger") and six other individuals were indicted. On June 18, 1987, the grand jury returned a sixty-six count superseding indictment which charged

violations of the Racketeer Influenced Corrupt Organization Act ("RICO"), RICO conspiracy, mail fraud, solicitation of kickbacks to influence the operation of an employee benefit plan, embezzlement from an employee welfare plan, Hobbs Act extortion, collection of credit and claims by extortionate means, interstate travel in aid of racketeering and embezzlement of union funds in contravention of 18 U.S.C. §§ 1962(c), 1962(d), 1341, 1954, 664, 201, 1951, 894, 1952 and 29 U.S.C. § 501(c), respectively.

Appellants were tried and convicted on various counts of the superseding indictment and duly sentenced. This appeal followed.

I. JURISDICTION

The district court had jurisdiction based on alleged violations of federal criminal statutes. We have jurisdiction pursuant to U.S.C. § 1291 (1982).

II. BACKGROUND

Due to the complex nature of this appeal we outline the structure of this opinion. After setting forth both a factual overview and, in a general way, the facts relating to the specific charges, those arguments that were raised in common by several appellants will be resolved. Thereafter, the contentions asserted by individual appellants that are unique to their circumstances will be determined.

On September 23, 1985, listening devices and the interception of communications in the Business Manager's Office and Business Agent's Meeting Room at the

offices of the Roofers Union Local 30/30B were authorized. Electronic surveillance continued through February 26, 1986. The fruits of this surveillance and other material eventuated in the indictments and convictions here involved.

A. MAIL FRAUD:

Appellants Medina and Traitz, Jr. were found guilty of mail fraud in violation of 18 U.S.C §§ 1341 and 1342. The facts concerning this charge are as follows. On June 21, 1985, Merina, while operating an automobile leased for him by the Roofers Union, was involved in a hit-and-run accident. After the accident, Medina took the vehicle to the outskirts of Philadelphia and set it on fire. Medina and Traitz, Jr. then, using the mails, reported to their insurance carrier that the car had been stolen resulting in a payment of $18,075.00 by the insurance company.

B. BRIBERY AND KICKBACKS:

On October 16, 1985, Medina was arrested on Pennsylvania state charges for aggravated assault in connection with the motor vehicle accident of June 21, 1985. Thereafter, conversations were intercepted in which Traitz, Jr. said that he was going to "buy Medina out of trouble" and was going to get the "right" judge for the case. When Medina was released on his own recognizance, Traitz, Jr. acknowledge having "arranged" for Medina's release with the Bail Commissioner Margaret McCook. Later, Traitz, Jr. gave $300 to Philadelphia police

Officer John McCook, the husband of the Bail Commissioner, and said to John McCook, "give that [the $300] to your wife."

In addition a conversation on November 11, 1985, among Traitz, Jr., Crosley, Hurst and Mangini, was intercepted in which the men were discussing giving "Christmas" envelopes, containing cash, to various public officials. This discussion was followed by several conversations in November in which Traitz, Jr. and other individuals created the procedure by which the "gifts" were to be made. In order to assure secrecy, the "gift" envelopes would not contain the names of the recipients but would bear a number of hash marks corresponding to the total number of hundreds of dollars contained in the envelope.

On December 6, 1985, Traitz, Jr. met with Tommy Brown. Traitz, Jr. gave 21 envelopes and a list of names of the public officials to whom the envelopes were to be delivered, including how large a "gift" each person was to receive. On December 17, 1985, Brown reported to Traitz, Jr. that he had undelivered 19 of the 21 envelopes; Brown returned the undelivered envelopes to Traitz, Jr. Other public officials traveled to the offices of the Roofers Union to collect the "gifts" intended for them. In addition, appellant Nuzzi traveled from Pennsylvania to New Jersey to deliver "gifts" to Sheriff William Simon of Camden, New Jersey and his Deputy, Norbert Zuchowski.

C. OSHA BRIBERY

Evidence presented at trial established that Traitz, Jr. gave Bernard J. Dillon ("Dillon"), Area Director of the

Occupational Safety and Health Administration (OSHA), money in return for various favors. Dillon engaged in inspections of non-union job sites in order to harass the non-union employers and assisted, at the request of Traitz, Jr., a retired Philadelphia Police Officer to fill out an employment application for OSHA containing false information.

D. HOBBS ACT EXTORTION AND COLLECTION OF CREDIT BY EXTORTIONATE MEANS

Beginning in September, 1985, Local 30B contractors (also called "principals") were summoned to the offices of the Roofers Union. The purpose of the meetings was to institute a "new policy" and to "request" principals to pay fines for noncompliance with union rules. The new policy required principals to report at least 100 hours of work per month (the "100 hour plan"), thereby mandating a minimum union payment of $60, in contrast to the previous policy which did not contain a minimum reporting requirement. In addition, non-union contractors were summoned to the union offices to induce them to become union-contractors.

The meetings with the contractors were shown to be confrontational and intimidating in that the principals were often threatened and physically abused by union officials–typically the union business agents who were ex-amateur or ex-professional boxers.

III. DISCUSSION

A. COMMON ARGUMENTS

1. FACIAL SUFFICIENCY OF THE OCTOBER 24, 1985 ORDER

The October 24, 1985 order (the "Order"), authorizing electronic surveillance of the Business Manager's Office and the Business Agents Meeting Room of the Roofers Union, was the second of five interception orders signed by the district judge then having responsibility for such matters. On appeal, there is no argument regarding the validity of the other four surveillance orders. The Order, however, was missing page three when it was signed by the district judge. Appellants claim that it was error for the district court to refuse to suppress the fruits of the electronic surveillance during the period when the Order was in effect.

The discrete question presented on appeal is whether the absence of page three and the information that would have been contained therein, renders the Order facially insufficient and therefore invalid under 18 U.S.C. § 2518(10)(a)(ii)[1]. Appellants contend that the Order was

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[1] 10 U.S.C. § 2518(10)(a) provides in pertinent part: "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision therefore, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that- . . . (ii) the order of authorization or approval under which it was intercepted is insufficient on its face . . . "

deficient in that the requirements of § 2518(3)(c) and (d) as well as § 2518(4)(d) were not satisfied requiring the suppression of the fruits of the Order. We will examine the merits of each of these contentions in turn.

a. REQUIREMENT THAT § 2518(3) FINDINGS BE IN WRITING

Under U.S.C. § 2518(5) "[e]xtensions of an order may be granted, but only upon . . . the court making the findings required by subsection (3) of this section." Subsection (3) of 18 U.S.C. § 2518 provides in pertinent part:

> Upon application the judge may enter an ex parte order . . . if the judge determines on the basis of the facts submitted by applicant that-
>
> * * *
>
> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense . . .

The findings required to be made pursuant to 18 U.S.C. § 2518(3)(c) and (d) were not set forth in writing. Appellants contend that these findings must be set forth in writing for the order to be valid. The appellants argue that it is only through written findings that a reviewing court can be satisfied that a district court has complied with the statutory mandate.

Section 2518(3) authorizes a judge to issue an ex parte order permitting electronic surveillance after the

judge *determines*,[2] *inter alia*, that normal investigative procedures have been tried and failed or appear unlikely to succeed if attempted or are too dangerous and that probable cause exists to believe that the place at which electronic surveillance is to be conducted is being used in connection with an offense. Nothing in the language of this section compels the judge to set forth the required findings in writing.[3] As one court stated: "there is nothing in § 2518(3)(c) which requires that particular words

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[2] Appellants contend that the requirement of § 2518(5) that the judge make "findings" rather than "determinations" as required by § 2518(3), imposes an additional burden on the judge to place these "findings" in writing. There is no reason to believe, absent a showing of congressional intent to the contrary, that Congress, by using the word "findings" rather than "determinations" meant that extension orders must contain written findings by the judge where such written determinations are not required for the initial order. Whatever distinction Congress may have intended in using these two different words, we can find no justification to presume that Congress intended to require a judge to issue written findings but not written determinations. Had Congress desired to require extension orders to be based on written conclusions by the judge it would have been a simple matter to state that "written findings" are required.

[3] Appellants citations to *United States v. Giordano*, 416 U.S. 505 (1974), *United States v. Chavez*, 416 U.S. 562 (1974) and *United States v. Lambert*, 771 F.2d 83 (6th Cir. 1985), *cert. denied*, 474 U.S. 1034 (1985) are unhelpful. Each of the Supreme Court cases indicates that the judge must make findings but does not discuss whether or not these findings must be made in writing. *United States v. Giordano*, 416 U.S. at 514; *United States v. Chavez*, 416 U.S. at 564. In *Lambert* the Sixth Circuit determined that the findings made by the judge in the case were sufficient to satisfy 2518(3)(c). That Court, however, made no determination as to whether written findings were required. *United States v. Lambert*, 771 F.2d at 91.

be used in the requisite finding or indeed that the finding be actually expressed in words rather than by act of the judge." *United States v. Tortorello*, 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973). *See also, United States v. Escandar*, 319 F. Supp. 295, 304 (S.D. Fl. 1970) ("Section 2518(3) requires only that the authorizing judge make a determination that normal investigative procedures have been tried and appear likely to fail. There is no specific mandate that such determination be reflected in the written order.").

Based on the language of the statute, we can conclude that the judge's act of signing the Order is sufficient evidence that the judge made the findings required under § 2518(3) of the statute.[4] Appellants, however, ask this Court to look beyond the language of the statute and find that overriding policy considerations warrant requiring the findings to be put into writing. Appellants urge this Court to find that it is only through written findings that a proper review of the district court's decision to allow

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[4] Appellants contend that because the judge issuing the order made written findings as to two of the required factual findings it is impermissible to find that the judge intended by his signature to make the statutory findings. Appellants argument misses the point. This Court is required to determine if written findings are required in order to satisfy the requirements of 2518(3). Once we determine that the findings need not be made in writing it is irrelevant whether the district court judge made some or none of the findings in writing. The fact that the district judge made some of the findings expressly cannot alter this Court's determination of whether or not the statute, 2518(3), compels the findings to be so made.

electronic surveillance can be had. Appellants liken this to the requirement that a court make specific written findings of fact in order to comply with Rule 52(a) of the Federal Rules of Civil Procedure.

Appellants' argument is without merit. In this case, in order to review the district court's decision to enter an *ex parte* order allowing electronic surveillance this Court need only look to the affidavit which was presented to the district court in support of the government's application. This in fact is the practice that has developed. *See United States v. Martinez*, 588 F.2d 1227 (9th Cir. 1978); United States v. Armocida, 515 F.2d 29 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975). Thus, it cannot be said that the findings of fact required to be made pursuant to § 2518(3) must be made in writing in order for an appellant court to have a "clear understanding of the trial court's judgment." *See Feely v. United States*, 337 F.2d 924, 935 (3d Cir. 1964).

This conclusion becomes all the more apparent when one examines the other four electronic surveillance orders in which the district court set forth its findings in writing. In each of these four orders the district court's findings simply tracked the language of § 2518(3)(a)-(d). Such bald recitations do little to aid this Court in assessing the propriety of the district court's order. Instead, requiring the district court to set forth its findings in writing would promote form over substance and would create a requirement, amount to a trap for the unwary, where none was apparently on the mind of Congress. *See e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 11 *reprinted in* 1968 U.S. Code Cong. & Admin. News 2153.

Nevertheless, appellants ask this Court to draw upon precedent in the federal immunity context and find a requirement that the district court place its findings in writing. In relevant part, 18 U.S.C. § 6003 provides that a United States Attorney may request an immunity Order from the district court immunizing a witness if in "his [the United States Attorney's] judgment- (1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused to testify or provide other information on the basis of his privilege against self-incrimination." Although not mandated by the statute, it has been held that the findings of the United States Attorney must be made explicitly. *United States v. Herman*, 589 F.2d 1191, 1201 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *In re Bart*, 304 F.2d 631, 635 (D.C. Cir. 1962).

Appellants contend that this establishes that important statutory findings should not be left to inference. Notwithstanding the merits of requiring a United States Attorney to set forth statutory findings explicitly in the immunity context,[5] we decline to adopt such an approach where, as here, such a requirement is not mandated by the statute and where policy considerations actually disfavor such an approach.

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[5] Apparently, the rationale for requiring that the United States Attorney set forth the statutory criteria explicitly is to insure compliance with the statutory requirements. *United States v. Herman*, 589 F.2d 1191, 1201 (3d Cir. 1978), *quoting*, *Ullman v. United States*, 350 U.S. 422, 434 (1956). In the instant context, as explained above, we do not need to rely on recitations by the district court to insure statutory compliance but instead can look to the affidavit submitted by the government in support of its request for electronic surveillance.

Finally, appellants argue that the missing recitations reveal that the district court impermissibly "rubber stamped" the request of the government for electronic surveillance. *United States v. Ford*, 553 F.2d 146, 165-166 (D.C. Cir. 1977). Appellants claim that the district judge's signature on an order which was missing a page indicates that the judge had not carefully reviewed the order and that this requires invalidation of the order.

Appellants' contention, although superficially attractive, is analytically flawed. In examining whether the judge properly performed his function it is not the order which must be examined but rather the application and affidavit which were submitted in support of the interception order. *United States v. Ford*, 553 F.2d at 169; *United States v. Ventresca*, 380 U.S. 102, 109 (1965) ("Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber for the police.").

In the instant case, there is no suggestion on appeal that the affidavit submitted by the government in support of electronic surveillance was improper. Thus, examining the words in the proper light, we cannot conclude that the district court "rubber stamped" the government's request without exercising its independent judgment.

b. REQUIREMENTS OF 18 U.S.C. 2518(4)

Section 2518(4) provides in pertinent part:

> (4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify-

* * *

> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;

Appellants claim that the Order is facially defective because it fails to identify either the investigating agency or the Department of Justice official who authorized the application for electronic surveillance. It should be noted that each the other four surveillance orders stated:

> Wherefore, it is on this [date] . . . Ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice are authorized pursuant to the application provided by Honorable Stephen S. Trott.

A two tiered analysis must be employed to review appellants' claim. First, this Court must determine if the Order was facially deficient. If we find that the Order was defective in some manner, we must examine the defect to determine if it is merely a technical defect which would not require suppression of the evidence obtained from the electronic surveillance. *United States v. Acon*, 513 F.2d 513, 517 (3d Cir. 1975).

In this case, the Order cannot be considered to have been facially defective. First, the Order effectively identifies the FBI as the agency authorized to intercept oral communications. Page six of the Order states "the Bell Telephone Company of Pennsylvania shall furnish the Federal Bureau of Investigation such information, facilities and assistance as are necessary to accomplish the oral interception . . . ." As the district court concluded: "Logic dictates that if the order directs the Bell Telephone Company to assist the FBI with the interception, then the FBI is the agency authorized to intercept."

Second, the Order sufficiently identifies the person authorizing the application. 18 U.S.C. § 2516 provides in relevant part that:

> "the Attorney General, Deputy Attorney General, Assistant Attorney General, any Assistant Attorney General, any acting Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal Judge . . . [for] an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation . . . "

In the instant case, page four of the Order states that the: "Assistant Attorney General, Criminal Division, United States Department of Justice, who has been designated by the Attorney General of the United States to exercise the power conferred upon him by Section 2516, Title 18, United States Code . . . " The necessary inference from the above quoted passage of the Order is that the Assistant Attorney General of the Criminal Division was in fact using the power granted him by the Attorney General and was authorizing the application for an electronic surveillance order. It makes little difference in law that the person authorizing an application for interception was identified by title rather than by name. *Cf. United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984) (Attorney General complies with § 2516(1) when he specially designated an Assistant Attorney General by job title rather than by name).

Even if, arguendo, it can be said that the Order failed to adequately make the relevant identifications, these omissions are properly viewed as technical defects not warranting suppression of the evidence discovered as a

result of the electronic surveillance. In *United States v, Acon*, 513 F.2d 513, 518 (3d Cir. 1975) this Court stated: "suppression is not required for facial insufficiency relating to less critical requirements which may be varied by subsequent affidavits. The identification directives [of § 2518(4)(d)] in our opinion fall within this category. In such a situation, suppression will not be required where there was substantial compliance with the statute." *Id. See United States v. Vento*, 533 F.2d 838, 861 (3d Cir. 1976). It must be recognized that "§ 2518(4)(d) 'requires that the order note the agency authorized to make the interception and the person who authorized the application so that responsibility will be fixed.'" S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), *quoted in, United States v. Chavez*, 416 U.S. 562, 572 (1974).

In determining whether there was substantial compliance with the statute we may look beyond the face of the order to the facts as they actually existed in order to determine if there was compliance with the substantive requirements of the statute. *United States v. Acon*, 513 F.2d at 518. In *Acon*, for example, an unauthorized person signed the application for electronic surveillance. This Court, however, accepted affidavits, which were first presented at the suppression hearing, from both the unauthorized person and the Attorney General showing that the Attorney General had actually authorized the application. *Id.* at 514 This Court found that the Attorney General's actual approval of the wiretap was substantial compliance with the statute. *Id.* at 519.

In the instant case the application for the Order and the accompanying affidavit reveal substantial compliance with the statute. The application and the accompanying

affidavit reveal numerous references to the FBI as the agency that will conduct the electronic surveillance. Moreover, the application states that: "Pursuant to Section 2516 of Title 18 of the United States Code, the Assistant Attorney General of the Criminal Division, the Honorable Stephen S. Trott, having been specifically designated by the Attorney General of the United States . . . has approved the application for an order authorizing the interception of oral communications." Thus, there can be no question that Stephen Trott, a person specifically designated by the Attorney General,[6] actually authorized the application for electronic surveillance. Moreover, the purpose of the statutory rule, accountability, has not been undermined because both the agency undertaking the surveillance and the party authorizing the application for surveillance are clearly identified. *See United States v. Chavez*, 416 U.S. 562, 572 (1974). Under either or both of the approaches the requirements of 18 U.S.C. § 2518(4) were satisfied.

2. HOBBS ACT EXTORTION

Counts twenty-four through forty-one of the superseding indictment charged nine of the thirteen appellants

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[6] Order No. 10088-85 of March 28, 1985 was attached to the October 24, 1985 application for electronic surveillance. This order, signed by Attorney General Edwin Meese, specially designated, *inter alia*, the Assistant Attorney General in charged of the Criminal Division to authorize applications for the interception of wire or oral communications. There is no contention on appeal that this order did not adequately vast Stephen Trott with the power to authorize an application for electronic surveillance.

with Hobbs Act violations, 18 U.S.C. § 1951.[7] These charges stemmed, *inter alia*, from the appellants' participation in the "100 hours" program described above. All of the nine persons charged were found guilty of at least one count of Hobbs Act extortion.

> In pertinent part, the Hobbs Act provides:
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more that $10,000 or imprisoned for not more than twenty years or both.

"Extortion" is defined in the Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear . . . ." 18 U.S.C. 1951(b)(2).

At trial appellants objected to several parts of the judge's charge to the jury on the Hobbs Act counts. The district judge instructed the jury that four elements must be satisfied before it can find appellants in violation of the Hobbs Act. The court stated:

> In order to meet its burden of proving that the defendants committed extortion under the Hobbs Act, the Government must prove each of the following elements:
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> First, that the defendants induced or attempted to induce others to part with their property;

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[7] The four Appellants not charged with Hobbs Act violations were Traitz, Jr., Hurst, Daly, and Nuzzi.

> Second, that the defendants did so with the victims' consent, but that this consent was compelled by the wrongful use or threat of force, violence or fear;
>
> Third, that interstate commerce or an item moving in interstate commerce was delayed, obstructed or affected in any way or degree; and
>
> Fourth, that the defendants acted knowingly and willfully.

The appellants do not challenge the district judge's general recitation of the essential elements of the Hobbs Act but rather contend that the district judge erred in his instructions on the appellants' defense theories. We review the district judge's charge to "determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury." *Link v. Mercedes-Benz of North America*, 788 F.2d 918, 922 (3d Cir. 1986). We will address appellants' three challenges to the district court's charge seriatim.

a. WRONGFULNESS OF THREAT OR USE OF FORCE

In *United States v. Enmons*, 410 U.S. 396 (1973), striking workers committed acts of violence against their employer's property in pursuit of higher wages and other benefits. *Id.* at 398. On these facts, the Supreme Court held that an alleged extortionist could not be convicted under the Hobbs Act for violence related to union activity aimed at obtaining property to which s/he had a lawful claim. The basis for this holding is the fact that such

conduct in not "wrongful" as that term is used in the Hobbs Act. Thus, in *Enmons* the Supreme Court found that an alleged extortionist must not only employ an unlawful *means* but must act in pursuit of an unlawful *end*.

Appellants claim that the jury charge on the Hobbs Act was in error because the judge told the jury that the *Enmons* defense hinged on whether the collective bargaining agreement authorized the "100 hours" plan. That is to say, the district court's test for whether the union has a lawful claim to the proceeds of the 100 hours program turned on the terms of the collective bargaining agreement. Thus, the discrete question presented on appeal is whether it was appropriate, in this case, for the district court to use the collective bargaining agreement as the polestar for determining wrongfulness.[8]

We conclude that the collective bargaining agreement was the correct test and that the district court's charge on the *Enmons* defense was therefore proper. In *United States v. Russo*, 708 F.2d 209 (6th Cir.), *cert. denied*, 464 U.S. 993 (1983), the Sixth Circuit was forced to determine if the appellants, an officer and an employee of the J & J Cartage Company, had acted "wrongfully" as that term is used in the Hobbs Act. In that case the Company and the Teamsters Union entered into a collective bargaining agreement which provided, in relevant part, that the Company would make the necessary contributions to the employees' union Health and Welfare Fund. Thereafter,

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[8] The government did not contest the jury instruction on the *Enmons* defense. Therefore, for the purpose of this appeal, we will assume without deciding that the appellants were entitled to the *Enmons* instruction in the first instance.

the Company, without renegotiating the collective bargaining agreement, imposed an 11% "service charge" on the employees to cover the Company's contribution to the benefits plan. The court concluded that the Company had no lawful claim to the service charge because the existing collective bargaining agreement "expressly required the Company to make payments to the welfare and pension funds out of the Company's own funds." *Id.* at 215. Thus, *Russo* stands for the proposition that "*Emmons* does not apply to the extraction of payments in violation of the collective bargaining agreement because their could be no lawful claim to that property." *United States v. Jones*, 766 F.2d 994, 1002 (6th Cir. 1985), *citing, United States v. Russo*, 708 F.2d at 215. *See also, United States v. Cusmano*, 729 F.2d 380, 382 (6th Cir.) *cert. denied*, 467 U.S. 1252 (1984) (same facts and same result as *Russo*).

In this case, as in *Russo*, the violent acts of the appellants were not perpetrated either during a strike or during an attempt to modify a collective bargaining agreement. Viewed in the best light, the appellants' violent actions were taken to enforce an unwritten union policy. In such a circumstance, the only was in which the appellants' conduct can arguably be said to be insulated from Hobbs Act liability is for the actions to have been taken in pursuit of property to which they were entitled under the collective bargaining agreement. *See United States v. Russo*, 708 F.2d 215; *United States v. Cusmano*, 729 F.2d at 382. Thus, examining the jury charge in the light of the evidence, the *Enmons* defense was fairly and adequately submitted by the court to the jury.

b. ADVICE OF COUNSEL DEFENSE

In September, 1985 the advice of an attorney, Bernard N. Katz, was sought regarding the implementation of the 100 hours program. At trial, appellants sought to prove that they relied on Katz's legal advice that the 100 hours program was legitimate. Thus, the appellants contended at trial that because they relied on the advice of counsel they were entitled to an acquittal on the Hobbs Act counts.[9]

The district judge's charge to the jury on the advice of counsel defense included the following language: "you must determine whether the defendants relied in good faith on the lawyer's advice after full disclosure to him of all the material facts about how the [appellants] would conduct themselves in the union's conference room." Appellants claim that this charge was in error because it required that the appellants receive their lawyer's advice on the manner in which they conducted themselves in the union's conference room. Appellants contend that so long as they received the advice of counsel on the legitimacy of the end sought, i.e. the collection of the proceeds of the

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[9] It should be noted that the simple invocation of advice of counsel defense does not automatically insulate a defendant from liability. Where the advice of counsel is properly invoked it becomes a "matter to be considered by the jury in determining the appellants' guilt." *United States v. Thaggard*, 477 F.2d 626, 632 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

100 hours program, then under *Enmons* the means used to obtain these funds becomes irrelevant.[10]

Appellants' contention is meritless. The advice of counsel defense, "based on good faith reliance on an attorney's advice[,] requires full disclosure of all the material facts . . . ." *United States v. Martorano*, 767 F.2d 63, 66 (3rd Cir.) *cert. denied*, 474 U.S. 949 (1985). It must be remembered that the advice of counsel defense is meant to be available only to those who, after full and honest disclosure of the material facts surrounding a possible course of action, seek and obtain the advice of counsel on the potential legality of their actions. *Id.* The defense is not designed to insulate illegal conduct. *Id.* Rather, the basis for the defense "is that, in relying on counsel's advise, [a] defendant lacked the requisite intent to violate the law." *United States v. Polytarides*, 584 F.2d 1350, 1353 (4th Cir. 1978). *See also United States v. Conner*, 752 F.2d 566, 574 (11th Cir.) (must consult attorney in good faith for the purpose of securing advice on the lawfulness of future conduct), *cert. denied*, 474 U.S. 821 (1985).

In this case, counsel's advice was sought on the legitimacy of the 100 hours program. The nature of the disclosure required to satisfy the materiality element of the advice of counsel defense requires an *ex ante* examination. Disclosures which are material before the potentially illegal action was taken cannot be rendered immaterial for

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[10] For the purposes of analysis, we will again assume without deciding that *Enmons* is applicable. Similarly, in examining the propriety of the jury charged on the advice of counsel defense we are assuming without deciding that the defense was applicable in the first instance.

the purposes of the advice of counsel defense based on the fortuity of a later conceived litigation strategy, i.e. by the *Enmons* defense. Thus, material facts, in this case, included not only ends sought from the 100 hours program but the means to be used in the collection process. It was only through disclosure of both the means and the ends that counsel could properly evaluate the potential legality of the 100 hours program.

Accordingly, viewed in the light of the evidence, the advice of counsel defense was fairly and adequately submitted to the jury.[11]

c. KNOWLEDGE AND WILLFULNESS

The district court instructed the jury on the element of knowledge and willfulness as follows:

> If you find that a defendant had a good faith belief that he was acting pursuant to a legitimate union objective, such as the resolution of a grievance or the enforcement of a contract term, then you should find that the defendant did not act wilfully. On the other hand, if a defendant believed that requiring working principals to report at least a hundred hours per month was a hustle, or if a defendant did not really believe that he was acting legitimately to resolve a bona fide grievance as contemplated by the contract,

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[11] Because we conclude that the jury charge on the advice of counsel defense was proper, appellants' contention that the district judge should have adopted their proposed charge is meritless. "It is well settled that there is no error to refuse to instruct as counsel wishes if the charge to the jury is correct." *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972) (citations omitted).

then you should find that the defendant did not have such a good faith belief.

Appellants claim that the inclusion of the word "hustle", over their objection, was unnecessary and prejudicial. Appellants note that the phrase "a hustle" was a quote from one of the taped conversations between Traitz, Jr. and Medina. Appellants contend that by using the word "hustle in the context of the 100 hours program the district court highlighted one piece of the evidence in such a way as to demean the appellants' *Enmons* defense and was therefore in error.

It is settled law that "in examining an allegedly erroneous instruction to the jury, it is necessary to view the charge as a whole." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3d Cir.) *cert. denied*, 432 U.S. 907 (1977). *See Walters v. Mintec/ International*, 758 F.2d 73, 76 (3d cir. 1985). It must be recalled that a "district judge has broad discretion in framing the form and language of the charge to the jury." *Board of Water Works of the City of Des Moines, Iowa v. Alvord, Burdick & Howson and Dorr-Oliver, Inc.*, 706 F.2d 820, 823 (8th Cir. 1983). "When the instructions, taken together, properly expresses the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism." *Somer v. Johnson*, 704 F.2d 1473, 1477-1478 (11th Cir. 1983). In order for this Court to be justified in reversing the district court, we "must be left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Id.* at 1478; *quoting, Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981).

Admittedly, "hustle" was not the best word for the district court to use. As the appellants note, it would have been better for the district judge to have said that the jury must assess whether the defendants had a "genuine belief" that the 100 hours program was legitimate. This error, however, amounts to no more than a minor indiscretion and cannot form the basis for reversal of the district court. The district judge's charge on the issue of knowledge and willfulness, when viewed as a whole, clearly and accurately set forth the law. The district judge informed the jury that if the defendants had a good faith belief that they were acting in pursuit of a legitimate union objective then the jury should find that the defendants did not act willfully. We are not permitted, and it would not be desirable, to reverse the district court simply because its use of the word "hustle" may be "subject to criticism." *Somer v. Johnson*, 704 F.2d at 1478. Therefore, we conclude that the issue was fairly and adequately submitted to the jury.

3. PENNSYLVANIA AND NEW JERSEY BRIBERY STATUTES AS RICO PREDICATE ACTS

In Count two of the superseding indictment, appellants Traitz, Jr., Hurst, Mangini, Crosley, Osborn, Williams and Nuzzi were charged with violations of the Pennsylvania and New Jersey bribery statutes as predicate acts comprising a pattern of racketeering in violation of RICO.[12] 18 U.S.C. § 1961(5). The indictment specifically

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[12] Under 18 U.S.C. § 1961(5) a "pattern of racketeering requires at least two acts of racketeering, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering."

charged the appellants with violations of the Pennsylvania Bribery statute,[13] 18 Pa. C.S. § 4701, and the New Jersey Bribery statute,[14] N.J.S.A. § 2C:27-2. All of the above mentioned appellants were convicted on the

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[13] The Pennsylvania Bribery statute, 18 Pa. C.S. § 4701 provides, in pertinent part, as follows:

(a) Offenses defined. -A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts, or agrees to accept from another;

(1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;

(2) any benefit for consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

[14] The New Jersey Bribery statute, N.J.S.A. § 2C:27-2, provides, in relevant part, as follows:

A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another;

a. Any benefit as consideration for a decision, vote, recommendation or exercise of discretion of a public servant, party official or voter on any public issue or in any public election; or

b. Any benefit as consideration for a decision, vote, recommendation or exercise of official discretion in a judicial or administrative proceeding; or

c. Any benefit as consideration for a violation of an offical duty of a public servant of party offical; or

d. Any benefit as consideration for the performance of offical duties.

substantive RICO count charged in count two.[15] 18 U.S.C. § 1962(c).

In addition, counts 64 and 65 of the superseding indictment charged appellants Traitz, Jr. and Nuzzi with traveling in interstate commerce to commit bribery in violation of 18 U.S.C. § 1952.[16] Specifically, appellants Traitz, Jr and Nuzzi were charged with traveling from Philadelphia, Pennsylvania to Camden, New Jersey with the intent to bribe New Jersey Sheriff William Simon and New Jersey Deputy Sheriff Norbert Zuchowski. Thus, it is New Jersey law which is to be used to furnish the definition of bribery for purposes of the § 1952 counts. 18 U.S.C. § 1952(b)(2). *See United States v. Dansker*, 537 F.2d

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[15] 18 U.S.C. § 1962(c) provides: "It shall be unlawful for any person employed or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[16] Section 1952 of 18 U.S.C., provides in pertinent part:

(a) Whoever travels in interstate commerce or uses any facility in interstate or foreign commerce, including the mail with intent to

* * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity.

* * *

(b) As used in this section "unlawful activity" means

* * *

(2) extortion, bribery, or arson in violation of the laws of the State in which committed in of the United States.

40, 47 (3d Cir. 1976). Both Traitz, Jr and Nuzzi were convicted on both counts 64 and 65.

In charging the jury on the elements of bribery in both New Jersey and Pennsylvania, the district judge charged the jury, in relevant part,[17] as follows:

> To prove the acts of racketeering charging bribery under Pennsylvania and New Jersey law, the government need not show that the public official or public servant performed any act or intended to perform any act in return for the money or property given to him. Rather, the focus must be on the alleged bribers – that is, the defendants – and whether or not they intended to influence official action through the payment of money or giving of property.

Appellants contend that the district judge's charge to the jury was in error in that the judge should have

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[17] The jury charge on the essential elements of bribery under Pennsylvania and New Jersey law was given as follows:

Here are the elements of bribery.

First, that the defendant offered, conferred or agreed to confer a benefit upon another person.

Second, that the benefit was intended to be consideration for the decision, opinion, recommendation, vote or other exercise of discretion of a public servant or that the benefit was intended to be considered for a violation of a known legal duty.

Third, that the defendant performed those acts knowingly or willfully.

Thus, any contention by appellants that the district judge failed to charge the jury using the "in consideration for" language found in the relevant bribery statutes is meritless as a matter of fact.

informed the jury tht in order to find a violation of either the Pennsylvania or New Jersey bribery statutes the jury must find a *quid pro quo* between the alleged briber and the alleged bribee. More specifically, appellants claim that the judge should not have charged the jury that the relevant inquiry is whether the appellants intended to influence official action. Rather, in appellants' view, the judge should have told the jury that they must find that an agreement existed between the appellants and those receiving the benefit in order for the jury to find that the appellants acted in contravention of the state bribery statutes.

We must review the jury charge to detemine if, taken as a whole and in the light of the evidence, it fairly and adequately submitted the issue to the jury. *Link v. Mercedes Benz of North America*, 788 F.2d 918, 922 (3d Cir. 1986). If the district judge communicated the substance of the law correctly to the jury such that the jury was not mislead as to the applicable law and the relevant issues, then there is no error. *Dairyland Insurance Co. v. Makeover*, 654 F.2d 1120, 1127-1128 (5th Cir. 1981).

Both Pennsylvania and New Jersey make it a crime for a party to offer, confer or agree to confer upon another any benefit in consideration for the violation of an official duty.[18] The question which must be addressed

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[18] It should be noted that instead of using the words "official duty" the Pennsylvania statute uses the words "known legal duty". Compare 18 Pa. C.S. § 4701(a) with N.J.S.A. 2C:27-2. This distinction is irrelevant to the issues raised on appeal and the phrases will therefore be used interchangeably.

is whether the "in consideration for" language creates a requirement of mutual assent on the parts of both the briber and the bribee to form an agreement or if it instead merely requires a subjective intent on the part of the briber to confer a benefit in return for some illicit gain. We conclude that the latter position is the correct one and that the district judge's charge to the jury on the state bribery laws accurately reflected the legal elements of those offenses.

Both the Pennsylvania and New Jersey bribery statutes were adopted from § 240.1 of the Model Penal Code. Under both Pennsylvania and New Jersey law it is a crime to *offer, confer* or to *agree to confer* any benefit as consideration for the violation of an official duty. The offering of a benefit as consideration does not logically imply that an agreement has been formed (much less that a *quid pro quo* has been delivered) but merely evidences a party's, i.e. the offeror's, subjective intent to enter into a transaction. This position is in accord with the clear intent of the authors of the Model Penal Code, to wit:

> The Offense of bribery is defined in a manner that includes a completed agreement between the person who offers the bribe and the person who receivs it. It also permits prosecution of inchoate conduct intended to achieve that objective. The terms "offers" and "solicits" clearly refer to such inchoate behavior and are designed to include what might be regarded as an attempt to give or receive a bribe.
>
> * * *
>
> In the context of bribery one who "solicits" a benefit "in consideration for" his official conduct is thus one who, with the purpose to promote or facilitate his receipt of a benefit in exchange for his official action,

> commands, encourages, or requests another to supply the benefit. . . .
>
> The solicitation aspect of the offense is thus, in effect, a crime of purpose; the actor must have as his conscious objective the receipt of a benefit as consideration for official conduct on his part. The term "offers" as it applies to the bribe giver similarly implies purposeful conduct.

Model Penal Code § 240.1 Comment 4(a) (Official Draft and Revised Comments, 1980).

Similarly, the "conferring" of a benefit does not require the formation of an agreement. As the Comments to the Model Penal Code instruct:

> Given the established applicability of the bribery offense to inchoate behavior, it would be possible to construe "confers" and "accepts" as signifying a completed bilateral arrangement-in effect an illegal contract to exchange a benefit as consideration for the performance of an official function. To do so, however, would impose a burden of proof on the prosecution which seems wholly unwarranted. The evils of bribery are fully manifested by the actor who *believes* that he is conferring a benefit in exchange for official action, no matter how the recipient views the transaction . . . It is wholly appropriate, therefore, to view the action of conferring a benefit or accepting a benefit entirely from the point of view of the actor. If he meant to confer a benefit as consideration for official action or accept a benefit for that purpose, the offense of bribery is complete. (emphasis in the original)
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> * * *
>
> Each defendant should be judged by what he thought he was doing and what he meant to do, not by how his actions were viewed by the other party.

Model Penal Code § 240.1 comment 4(c) (Official Draft and Revised Comments, 1980), *Quoted in, Martinez v. State*, 696 S.W.2d 930, 933 n.2 (Tex. App. 1985).[19]

The superseding indictment charged appellants with having offered or conferred benefits in violation of both the Pennsylvania and New Jersey bribery laws. Thus, against the backdrop of the superseding indictment in this case, the Pennsylvania and New Jersey bribery statutes do not require for their satisfaction, that an agreement be reached between the briber and the bribee but only require that the briber offer money or property to another with the subjective intent that s/he will induce some prohibited act in return. Therefore, the relevant inquiry, as the district court charged, was whether the appellants intended to influence official action through the payment of money or giving of property.

This view is in accord with previous decisions of this Court, the Eastern District of Pennsylvania as well as decisions of the Superior Court of Pennsylvania.[20] This Court previously noted that "the gravamen of the offense defined in § 4701 [of the Pennsylvania Crimes Code] is the solicitation or acceptance of a bribe not the delivery of its *quid pro quo*." *United States v. Davis*, 576 F.2d 1065,

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[19] It should be noted that *Martinez* limited and called in question the reasoning of *McCallum v. State*, 686 S.W.2d 132 (Tex. Cr. App. 1985), cited by appellants. Thus, *McCallum* has little value as persuasive authority.

[20] Interpretations of the Pennsylvania bribery statute are particularly persuasive for construing the New Jersey statute in that both were adopted without substantial relevant modification from § 201.1 of the Model Penal Code and therefore, as appellants concede, are virtually identical.

1067 (3d Cir. 1976), *cert. denied*, 439 U.S. 836 (1978). *See also United States v. Mazzio*, 501 F. Supp. 340, 343 (E.D. Pa. 1980)(mere offering of a bribe to a public servant completes the offense of bribery under Pennsylvania law), *aff'd*, 681 F.2d 810 (3d Cir. 1982), *cert. denied*, 457 U.S. 1134 (1982). As the Superior Court of Pennsylvania stated: "Under the section of the Crimes Code prohibiting bribery in official and political matter, once the offer to confer the proscribed benefit . . . is made, the crime is complete." *Commonwealth v. Clarke*, 457 A.2d 970, 972 (Superior Court 1983), *quoting, Commonwealth v. Ohle*, 435 A.2d 592, 596 (Superior Court 1981).

For all the foregoing reasons, we conclude that the district judge's bribery charge fairly and accurately submitted the law to the jury and that, accordingly, the charge was not in error.[21]

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[21] It should be noted that the case of *United States v. Danskar*, 537 F.2d 40 (3d Cir. 1976), cited by one of the appellants in a supplemental brief, does not support the appellants' case. In *Danskar* this Court examined a precursor to the current New Jersey bribery statute – the former statute being different in several material but not presently relevant ways – stated:

> The [New Jersey bribery] statute does not make criminal an agreement to influence, in an otherwise lawful manner, governmental action unrelated to his office. . . .Rather, in order to establish a violation of the statute, it must be demonstrated . . . that he agreed to exert that influence in a manner which would undermine the integrity of the public action. . . .

Thus, *Danskar* does not stand for the proposition that an agreement is required to find criminal liabliity. Instead the case stands for the notion that where an agreement is found it must be to engage in an otherwise unlawful act.

4. EXTENSION OF CREDIT BY EXTORTIONATE MEANS

Counts 42-61 of the superseding indictment charged appellants Traitz, Jr., Medina, Crosley, Shoenberger, Williams, Osborn, Traitz, Traitz, III, Mangini and Cannon with the collections of extensions of credit by extortionate means in violation of 18 U.S.C. § 894. In addition, counts 42-44, charging Traitz, Jr. with violating 18 U.S.C. § 894, was included by reference into count two as predicate acts constituting a pattern of racketeering in violation of RICO. Each of the appellants charged with violating § 894, with the exception of Mangini, were found guilty of at least one count.

Section 894 provides:

> (a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or
>
> (2) to punish any person for nonpayment thereof.
>
> shall be fined not more than $10,000 or imprisoned not more than 20 years or both.

Section 891(1) states that "[t]o extend credit means to make or renew any loan, or enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."

Appellants claim that their was insufficient evidence to convict them on the § 894 charges. The appellants also contend that the jury instructions on these charges were

improper. We will deal with each of appellants' objections in turn.

a. SUFFICIENCY OF EVIDENCE

The appellants claim that their convictions on counts 45, 48-50, 52-54 and 56-61, stemming from the appellants activities in the 100 hour program, were in error as there was insufficient evidence upon which to rest a guilty verdict. In order to find a violation of 18 U.S.C. § 894 there must be both "a 'extension of credit' and the use of 'extortionate means.' " *United States v. Giampa*, 758 F.2d 928, 933 (3d Cir. 1985). Appellants argue that the union pronouncement that working principals must make a minimum monthly psyment to the union of $60 was not an "extension of credit" as that term is used in § 894.[22] The jury verdict must be upheld if there is "substantial evidence, taking the view most favorable to the government, to support it." *United States v. Anderson*, 859 F.2d 1171, 1175 (3d Cir. 1988)

Appellants' argument does not withstand analysis. In *United States v. DiPasquale*, 740 F.2d 1282 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), this Court noted that "Congress explicitly intended that chapter 42 [of which § 894 is a part] be wielded with 'vigor and imagination.' " *Id.* at 1288, *citing*, Conf. Rep. No. 1397, 90th Cong. 2d

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[22] Counts 42 and 43 of the superseding indictment charged Traitz, Jr. with having violated § 894 through his efforts to collect debts owed to Scarfo. Appellant Traitz, Jr. does not argue on appeal that the evidence was insufficient as to his conviction on these counts.

Sess. 31, *reprinted in*, 1968 U.S. Code Cong. Ad. News 1962, 2029. This Court also noted that the "definition of extension of credit in § 891(1) was generously drafted . . . [and] has been even more generously construed." *United States v. DiPasquale*, 740 F.2d at 1288.

Thus, to find an "extension of credit" we need only find an agreement whereby the repayment or satisfaction of any debt – even a wholly fictitious debt – may or will be deferred. *Id.* at 1287. The agreement to defer repayment may be a tacit one which is implied from the circumstances surrounding the creation of the debt. *Id.* In *DiPasquale*, the appellants engaged in several instances of violent conduct whereby the appellants would, after claiming the right to a fictitious debt, torture their "debtor" and collect the claimed debt. On these facts, this Court concluded that under "section 891(1) an agreement to defer the repayment of a debt may be implied from the debt, even if the debt is wholly fictitious," *Id.*

In this case, there was both a debt and a tacit agreement that the debt's repayment would be deferred. The appellants, through their involvement in the union's 100 hour program, adopted a policy that working principals had to make a minimum monthly union payment of $60. Thus, on the first day of each month union contractors subject to the 100 hours program owed the Roofer's Union a debt of at least $60 in fees for that month. This debt was not, however, expected to be paid until sometime after the end of each month when the union-contractor would submit a statement indicating the number of hours worked for the preceding month. On these facts, we can find both a debt and a tacit agreement ot defer

repayment of the debt. The requirement of "an extension of credit" under § 891(1) is satisfied.

Appellants arguments to the contrary are entirely unavailing. First, appellants place great weight on *United States v. Boulahanis*, 677 F.2d 586 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982), in claiming that § 894 must be interpreted narrowly. This Court, however, explicitly rejected *Boulahanis* concluding that it was inconsistent with both the language and the purpose of chapter 42. *United States v. DiPasquale*, 840 F.2d at 1288.

Second, appellants claim that this Court's decision in *United States v. Giampa*, 758 F.2d 928, cannot be reconciled with *DiPasquale* and thereby limits *DiPasquale*. In *Giampa*, the alleged extortionist and several of his friends gave a man named Ciambrone funds in excess of $70,000 in the course of several separate transactions on the promise by Ciambrone that business ventures would be undertaken with the investors as partners in the enterprises. *Id.* at 930. The businesses were never opened and Giampa was eventually indicted based on threats he made to Ciambrone. *Id.* at 930-31. The district court in *Giampa* entered a judgment of acquittal on the ground of insufficient evidence. The issue on appeal was whether the district court's judgment of acquittal barred this Court from reviewing the merits of the case on appeal because of principles of double jeopardy. *Id.* at 933. This Court concluded that the district court's entry of judgment of acquittal barred review of the case on the merits. *Id.* at 934. In passing, this Court noted that based on the evidence at trial the district judge could reasonably find that there was no "extension of credit" within the terms of

§ 891(1) because the funds were given by the alleged extortionist as an investment rather than as a loan.

Even if we were inclined to look beyond the clearly distinguishable factual setting of *Giampa*, we could not find that *Giampa* restricts our analysis. This is the case because the holding in *Giampa* was that the appeal was barred by the double jeopardy clause and, accordingly, any comments regarding the merits of the § 894 charge are mere dicta. Thus, viewing the evidence, as we must, in the light most favorable to the government, we conclude that there was sufficient evidence to support the convictions under § 894.

b. JURY INSTRUCTIONS

Appellants contend that the district judge erred in refusing to permit the jury to consider *Enmons* as a defense to the § 894 (extension of credit by extortionate means) charges.[23] Appellants' contention is without merit. Appellants do not cite any case in which *Enmons* has been applied as a defense to a prosecution under any statute other than the Hobbs Act. Moreover, the Supreme Court's "holding in *Enmons* turned on its reading of the specific language of § 1951 – in particular the term 'wrongful' in the definition of extortion – and its reading of the Hobbs Act's singular legislative history." *United States v. Thordarson*, 646 F.2d 1323, 1327 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981). We believe it wholly

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[23] For the purposes of this argument we will assume that it was proper to charge the jury on the *Enmons* defense in the context of the Hobbs Act.

inappropriate to find that *Enmons* was meant to create a defense to a violation of § 894 where no legislative history can be found indicating a congressional intent to create such a defense. *Cf. United States v. Thordarson*, 646 F.2d at 1330 (court refused to find *Enmons* defense applicable to the Travel Act, 18 U.S.C. § 1952, RICO, 18 U.S.C. § 1962(d) or to use of explosives charges under 18 U.S.C. § 844(i)). Accordingly, we find that the charge given to the jury was not erroneous.

5. ADMISSION OF EVIDENCE CONCERNING UNCHARGED ACTS OF VIOLENCE

The district court, over the objection of the appellants, admitted 24 tape recordings involving uncharged acts of violence pursuant to Rule 404(b) of the Federal Rules of Evidence. Appellants contend that the tapes should not have been admitted because they do not bear on the appellants' intent. "The standard by which we review a trial judge's decision to admit evidence of uncharged offenses is abuse of discretion." *United States v. O'Leary*, 739 F.2d 135, 136 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985).

Recently, this Court has had the opportunity to address the scope of Rule 404(b). *United States v. Scarfo*, 850 F.2d 1015 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 263 (1988). In *Scarfo* this Court stated that "[t]he drafters contemplated that Rule 404(b) would be construed as a rule of 'inclusion' rather than 'exclusion.' " *Id.* at 1019. We also noted that "[t]he possible uses of other crimes evidence listed in the Rule -- motive, opportunity, intent,

preparation, plan, knowledge, identity and absence of mistake -- are not the only proper ones." *Id.* at 1019.

The relevant inquiry is not simply whether the tapes were probative of intent but "whether that evidence is probative of a material issue other than character." *Huddleston v. United States*, ___ U.S. ___, 108 S.Ct. 1496, 1499 (1988). In ruling on a suppression motion, the district court found, and the appellants do not contest, that the evidence of other violence goes to a "shared tradition" of violence and toward showing a "symbiotic relationship." Therefore, the evidence shows "the background of the charges, the parties' familiarity with one another and their concert of action." *United States v. O'Leary*, 739 F.2d at 136. Thus, in a conspiracy context these matters constituted permissible grounds for admission of evidence of other violence under Rule 404(b). *Id.* at 136-137.

Given that the evidence was admissible under Rule 404(b) and the enlarged mount of deference to be given a district judge under Rule 403 in balancing its probative value and the prejudice to appellants, we conclude that the district judge did not abuse his discretion in admitting the tapes pursuant to Rule 404(b). *See United States v. Scarfo*, 850 F.2d at 1019 ("[i]f judicial self restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."), *citing, United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978).

Appellants contend that notwithstanding the merits of the district court's analysis concerning the admissibility of the tapes under Rules 403 and 404(b), the district court erred in admitting the evidence without

requiring the government to prove that the tapes were admissible pursuant to 18 U.S.C. §§ 894(b) and (c). Appellants' argument is fatally flawed. 18 U.S.C. §§ 894(b) and (c) do not provide independent limitations on the admissibility of evidence otherwise admissible under Rules 403 and 404(b) of the Federal Rules of Evidence. As the legislative history of these subsections indicate, § 894(b) was meant merely to "codify a principle of evidence which already appears in the case law . . . [t]o allow evidence as to other criminal acts by the defendant to be introduced for the purpose of showing the victim's state of mind." Conf. Rep. No. 1397, 90th Cong., 2d Sess., *cited in*, 1968 U.S. Code Cong. & Ad. News 1028. Similarly, § 894(c) was enacted to permit the introduction of reputation evidence where such introduction was not uniformly permitted. *See Id.* at 2026. Thus, the district court did not err in failing to analyze the admissiblity of the tapes under § 894(b) and (c) after finding that they were admissible pursuant to Rules 403 and 404(b) of the Federal Rules of Evidence.

B. OSBORN

Appellant Osborn was convicted, *inter alia*, of four counts of Hobbs Act extortion. 18 U.S.C. § 1951. Osborn contends that there was insufficient evidence upon which to convict him of any of these charges. We must examine the evidence in the light most favorable to the government to determine if it was sufficient.

To support a conviction under the Hobbs Act the government was required to prove (1) that the defendant induced his victim to part with property; (2) that the

defendant did so by extortionate means; and (3) that interstate commerce was affected. *United States v. Rabbit*, 583 F.2d 1014, 1023 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *United States v. Addronizio*, 451 F.2d 49, 59 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972). Extortion is in turn defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear." 18 U.S.C. § 1951(b)(2).

Before moving to the appellant's specific arguments, we must address appellant's contention that in three of the four counts upon which he was convicted the government failed to show that there was an affect on interstate commerce. This assertion merits priority consideration because it raises a challenge to this Court's jurisdiction. *See e.g. United States v. Staszuk*, 517 F.2d 53, 59 (7th Cir. 1975) (en banc). The basis for this contention is that in three of the four counts the government failed to elicit specific testimony as to how the businesses of the individual contractors who were the object of the extortion affected or were effected by interstate commerce.

This Court has recognized that "Congress intended, by enacting the Hobbs Act, to punish interference with interstate commerce to the fullest extent possible under its constitutional power." *United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir. 1975) (en banc), *cert. denied*, 423 U.S. 1014 (1975). Consistent with this view, other courts of appeal have recognized that the impact on interstate commerce necessary to satisfy the Hobbs Act required is *de minimis*. *United States v. Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965 (1981); *United States v. Sander*, 615 F.2d 215, 218 (5th Cir.) ("minimal effect" on interstate commerce is necessary.), *cert. denied*, 449 U.S.

835 (1980); *United States v. Rabbit*, 583 F.2d 1014, 1023 (8th Cir. 1978). Moreover, the impact on interstate commerce may actually be positive or beneficial to interstate commerce. *United States v. Hedman*, 630 F.2d at 1195. *See also United States v. Mazzei*, 521 F.2d at 642 n.1 ("We do not consider the absence of affect on interstate commerce is shown by the fact that BMI [the object of the extortion] had a net cash inflow by reason of entering into the leases.")

In each of the cases cited above, the affect on interstate commerce was found to have existed by virtue of a depletion of the assets of the object of the extortion thereby diminshing that party's ability to purchase goods in interstate commerce. In this case, however, the government failed to introduce evidence that three of the four contractors either bought or sold any goods in interstate commerce. While the government contends that the jury was entitled to infer such facts based on evidence that roofing contractors in general purchased supplies in interstate commerce, we need not rely on this justification.

Instead, we find that the interstate commerce element is satisfied by the fact that the Roofer's Union and its affiliated benefit plans were interstate entities. To the extent that the Roofers Union would increase its revenues, or attempt to do so, by extorting or attempting to extort payments from contractors, the Roofers Union would have, or would attempt to have, more funds available to provide benefits to union members in several states. This is sufficient to supply the requisite nexus to interstate commerce. We believe that this conclusion is consistent with the congressionally intended breadth of the Hobbs Act as well as the Act's language prohibiting a party from affecting commerce in "any way."

Having determined that there was the requisite affect on interstate commerce, we next discuss the sufficiency of evidence as to each of the four counts upon which Osborn was conviced.

1. VALENTINO FOTI - COUNT 26

Osborn contends that the evidence was insufficient to establish that he extorted money from Valentino Foti in that the government failed to provide evidence that the second prong of the Hobbs Act test was met. Specifically, Osborn claims that the government failed to prove that Foti was put in fear and, even if the government proved otherwise, that it failed to prove there was a nexus between the fear and Foti's payments to the Roofers.

"It is well settled that the element of 'fear' required for the Hobbs Act can be satisfied by placing a person in apprehension of economic loss." *United States v. Agnes*, 753 F.2d 293, 302 n.15 (3d Cir. 1985). *See United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987) (en banc). A two-part test is to be employed to determine if a purported victim of an extortion was put in fear of economic loss. Examining the situation from the perspective of the victim "the proof need establish that the victim *reasonably* believed first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment." *Id.* at 951 (emphasis in the original).

Viewed in the light most favorable to the government, the evidence of fear of economic loss was sufficient to support the jury's guilty verdict. In this case, Foti was called into the union offices to be informed that his

participation in the 100 hours program was required. During the course of the meeting, Foti was told: [Y]ou won't care if we put you out of the union then? 'Cause you're not making any money anyway." To which Foti responded: "Sure I would." Given the power which the Roofer's Union was shown to have over contractor selection and manpower decisions, the loss to Foti which would flow from being displaced from the union is obvious. We conclude that it was reasonable for Foti to believe that Osborn both had the power to remove him from the union and would exercise such power.

Osborn's nexus argument is also flawed. At trial, Foti testified that he had never reported 100 hours in a month to the union prior to his meeting. Foti also testified that for the months which followed the meeting, he never failed to report 100 hours. Osborn contends that Foti "liked" the 100 hours program and thus paid the $60 a month by choice rather than out of fear. It is an understatement to say that Osborn's argument strains credulity. It is highly unlikely that someone would pay more in fees than that which he legitimately owed unless that person is driven by some form of coercion. Thus, the jury was justified in finding a nexus between the payments to the union and the meeting which Foti had at the union offices.

Accordingly, the jury's guilty verdict on Court 26 was supported by sufficient evidence.

2. ROBERT DENNIS - COUNT 38

Osborn claims that the evidence was insufficient to establish that Robert Dennis was extorted by Osborn in

that the government failed to prove any nexus between Dennis's fear and the payment of funds to the Roofer's Union.

Dennis, like Foti, was summoned to the meeting hall of the Roofer's Union to enforce his compliance with the 100 hours program. While in the meeting room, Dennis was confronted by five or six business agents of the Roofer's Union. He was hit twice by Osborn. During the encounter, Osborn was cheered on by appellant Medina who said: "Smack him in the mouth, Buddy [Osborn]. Smack him again . . . smack him again." In addition to physical abuse, Dennis was threatened with being thrown out of the Roofer's Union. Although prior to his encounter with the Roofer's Union, Dennis reported significantly under 100 hours, after his meeting he always reported 100 hours or more. At trial, Dennis was asked "Why did you begin paying $60 a month when you worked only 11 hours a month." Dennis responded: "That's what I was told to do."

Osborn argues that while Dennis was at the offices of the Roofer's Union he was only questioned regarding the adequacy of his remittance records and that any fear he felt was not the inducement for his payments of $60 per month. We believe that the jury, after hearing about the physical and economic coercion to which Dennis was subject, could have concluded that it was the meeting which induced Denis to pay the $60 per month to the union. This being so, we find that there was sufficient evidence upon which the jury could find Osborn guilty of Count 38.

3. ALLEN HUNTBACH - COUNT 41

Osborn was charged with and convicted of the attempted extortion of Allen Huntbach. Osborn claims that the evidence was insufficient to sustain his conviction in that Osborn did not induce Huntback to part with any property, Osborn also argues that to the extent that Huntbach did part with any property, Osborn is protected from criminal liability by virtue of the *Enmons* defense.

Huntbach was, and at the time of this trial remained, a member of the Roofer's Union. His union membership entitled Huntback to work for other union contractors, but Huntbach himself was not a union contractor. Huntbach, in an effort to earn extra money, engaged in working as an independent roofing contractor on weekends for friends and neighbors.

On November 26, 1985, Huntbach was summoned to the offices of the Roofer's Union. Upon entering, the meeting room, Huntbach was floored by a blow to the head. He was subsequently hit at least one more time during his encounter with several business agents including Osborn. The thrust of the business agents' discourse with Huntbach was that he could either join the union as a contractor or cease doing independent contracting work. The following excerpt suffices to show the tone and substance of the meeting.

> MB: [Osborn] First of all, if you want to get into business, we'll talk. If not I want you to get rid of the kettle [an instrument used to heat tar]
>
> * * *
>
> I want you to stop roofing. If you're caught roofing again, you're not ever going to work around here no

more. You can roof all you want if you, if you want to roof for a contractor. If you want to be a contractor, I'm gonna give you an opportunity. But you can't be working on the side, that's as simple as that. You got a . . . you got a choice. You got a choice . . . now what are you goona do? You gonna work again on the weekend? You want to work again on the weekend?

* * *

AH: [Huntbach] I don't think that was right that you hit me like that. To be honest with you . . .

MO: Well, how about if I, how about if I *** hit . . .

AH: (UI) [inaudible]

MO: You in the other side.

AH: Buddy, don't. Come on. What the hell man.

MO: Hey, listen, I'm telling you, you're not supposed to be *** workin on the side. You understand that?

AH: I understand that.

It is well settled that the Hobbs Act prohibits attempted extortion. *See e.g. United States v. Rosa*, 560 F.2d 149, 153 (3d Cir. 1977) (en banc). To prove attempted extortion the "inducement to part with property" element of the Hobbs Act is satisfied when the alleged extortionist "has attempted to induce his victim to part with property." *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978). In this case, looking at the evidence in the light most favorable to the government, abundant proof was introduced that Osborn attempted to induce Huntbach to join the union as a contractor. The purpose for this was to force Huntbach to pay union dues. Thus, the government introduced sufficient proof to allow a reasonable jury to conclude that

Osborn attempted to induce Huntbach to part with property.

Osborn contends that he did not seek to compel Huntbach to join the union but merely to give him a choice between ceasing his contracting work and joining the union as a contractor. We are not persuaded by this argument. From his discussion with Huntbach. Osborn knew that Huntbach owned his own kettle and was not prepared to sell it or to cease engaging in work as a roofing contractor. We believe that this so-called choice offered by Osborn was not, in practical terms, a real choice but amounted only to a veiled threat. As such, it cannot shield Osborn from criminal liability.

Osborn next contends that his actions are protected under the doctrine announced in *United States v. Enmons*, 410 U.S. 396 (1973). As discussed previously, to the extent that *Enmons* was properly found to apply to the facts of this case at all, it can only be used to protect a defendant from liability where his conduct was permitted under the terms of the collective bargaining agreement. The collective bargaining agreement, however, prohibits the imposition of pressure against principals to induce them to join the union. Thus, viewing Osborn's actions as an attempt to induce Huntbach to join the union as a principal, these action were prohibited by the collective bargaining agreement and were not protected by *Enmons*.

Accordingly, the evidence was sufficient to sustain the jury's finding of guilt on Count 41.

4. DAVID MAISEY - COUNT 36

Osborn was charged with and convicted of the attempted extortion of David Maisey. Osborn claims that the evidence was insufficient for the jury to have found that Osborn induced Maisey to part with property.

Osborn's confrontation with Maisey is reminiscent of his encounter with Huntbach. While at the Roofer's offices, Maisey was hit and was told that he could not continue to operate as a non-union contractor. At one point during the meeting, appellant Crosley said to Maisey: "Don't get scared now, you should have been scared . . . when you started this, when he [Osborn] told you weeks ago to get the *** out of the roofin' business." In the end, Maisey could either join the union as a contractor or stop working as a roofing contractor.

Preliminarily, Osborn contends that his conviction cannot be upheld because Maisey's statements in the tape recorded conversation were not admitted for their truth but rather to show Maisey's state of mind. We reject this argument because we do not rely on Maisey's statements at all in deciding the merits of Osborn's claim.

We believe that, taking the evidence in the light most favorable to the government, the jury could reasonably conclude that Osborn attempted by threats to induce Maisey to join the union and to in turn pay union dues. Moreover, for the reasons stated above, Osborn's *Enmons* defense similarly fails. Accordingly, Osborn's conviction on Count 36 will be affirmed.

C. CANNON

Appellant Cannon was indicted and convicted of one count of Hobbs Act extortion, one count of collection of credit by extortionate means and one count of RICO conspiracy. Cannon contends that the evidence was insufficient to warrant his conviction on any of these charges. We will examine the evidence in the light most favorable to the government to determine if the convictions can be upheld. *United States v. Anderson*, 859 F.2d 1171, 1175 (3d Cir. 1988).

Because Cannon's encounter with a contractor named Franco Procaccino was crucial to his eventual convictions, this incident will be outlined before the merits of Cannon's claims are discussed. Procaccino was summoned to the offices of the Roofer's Union. Once there, Procaccino was questioned by at least three officers of the Roofer's Union regarding the accuracy of his records. At one point, Procaccino was asked to leave the meeting room in which he was being questioned and in his absence appellant Medina stated: "he's scared to death." To which Joseph Traitz responded, *inter alia*, "How about getting the 100 hours." Later in the conversation Medina stated: "let me get Ernie Williams and tell 'em to hit 'em in the head." Several minutes into the encounter, Cannon entered the room. Cannon, in the course of a heated discourse with Procaccino, pulled Procaccino's ear and asked Procaccino if he was listening. After Cannon left the meeting room, Procaccino was informed that he would be required to report 100 hours per month to the Roofer's Union and pay the concomitant $60 monthly fee in order to remain a member of the Roofer's Union. At

trial, Procaccino testified that he was frightened during his encounter at the offices of the Roofer's Union.

1. SUFFICIENCY OF EVIDENCE ON THE EXTORTION COUNTS

Cannon claims that the evidence against him on both the Hobbs Act and the collection of credit by extortionate means charges was deficient in four ways, to wit: (1) the government did not prove that Cannon knowingly participated in the extortion; (2) the government did not establish that Cannon personally demanded Procaccino to pay money; (3) the government failed to prove that Procaccino was induced to pay money to the union out of fear; and (4) no evidence was introduced that Procaccino was forced to pay money which he did not actually owe to the union. We will deal with each of these contentions seriatim.

a. KNOWING PARTICIPATION

Cannon claims that the government failed to prove that he knowingly participated in the crimes of extortion charged. Cannon bases this assertion on the fact that during the time when Cannon was in the meeting room with Procaccino the only topic discussed was the accuracy of Procaccino's remittance reports. Cannon argues that it was not possible to conclude that he knew that Procaccino was called to the meeting room to be extorted.

Cannon's contention is meritless. In this case there was ample evidence that the confrontations between Roofer's Union officials and roofing contractors followed

a set script. Moreover, one of the taped conversations introduced into evidence exposed Cannon's awareness of the pattern. Therefore, under these circumstances, Cannon's knowledge of and participation in the overall scheme, the jury could reasonably find that Cannon knew that Procaccino was summoned to the Roofer's offices in order to be informed that his compliance with the 100 hours program would be required. *See United States v. Briola*, 465 F.2d 1018, 1022 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973); *United States v. Quintana*, 457 F.2d 874 (10th Cir. 1972), *cert. denied*, 407 U.S. 877 (1972).

b. PERSONAL DEMAND TO PAY MONEY

In a similar vein, Cannon argues that his extortion convictions cannot be upheld because there was no proof that Cannon either personally demanded the money or that any money was demanded in his presence. We reject this argument. In a case such as this, where the crimes of extortion follow a similar pattern and the alleged extortionist has knowledge of this pattern, it is unimportant that Cannon did not personally demand money or actually hear the demand. *See United states v. Rosa*, 560 F.2d 149, 154 (3d Cir. 1977). *See also United States v. Bell*, 812 F.2d 188, 194 (5th Cir. 1987) (Defendant may be "punished as one of several principals, each of whom performs only one role in a multi-part scheme to extort money and none of whom executes every step of that scheme."). On these facts, it was enough for the government to introduce evidence that Cannon was a participant in a common scheme. *See United States v. Briola*, 465 F.2d at 1022.

c. FEAR

Cannon claims that there was insufficient evidence to show either that Procaccino was put in fear or even assuming that he was put in fear, that his payments to the union were linked to his being afraid. In this case, Procaccino was shouted at by several men and Cannon, at one point, pulled Procaccino's ear. Moreover, the conversation intercepted between Medina and Joseph Traitz indicated that they believed Procaccino was afraid and that they were planning to continue intimidating Procaccino by calling in another man to hit him on the head. Furthermore, Procaccino testified at trial that he was afraid. Based on this evidence the jury could reasonably find that Procaccino was put in fear.

In addition, Procaccino testified at trial that, although, he had never previously reported 100 hours in a month, after his meeting he never failed to report 100 hours in a month. We conclude that based on this fact the jury could reasonably have found the required nexus between Procaccino's fear and his reporting of 100 hours to satisfy the requirements of both extortion statutes.

d. *ENMONS* DEFENSE

Finally, Cannon claims that his extortion convictions must fall because extortion cannot lie where the union was collecting money to which it was lawfully entitled. First, we must reiterate what was said earlier, there is no *Enmons* defense to an action pursuant to 18 U.S.C. § 894 (extension of credit by extortionate means).

Second, to the extent that the *Enmons* defense was properly considered by the jury at all in this case, the jury

could have rejected this defense based on the relevant facts. Procaccino testified that he might not have worked 100 hours in February, 1986, although he did report 100 hours worked to the union. In addition, on cross-examination Procaccino was asked: "in many of the months after the meeting in October, you actually worked 100 months [sic] and sometimes more; is that correct?" To which Procaccino responded: "some more and some less." Thus, the jury could have found from this evidence that during some months Procaccino worked less than 100 hours and yet paid union fees equivalent to 100 hours worked. As such payments were not provided for by the terms of the collective bargaining agreement, the union cannot in any sense be said to have had a lawful claim to the money and thus, Cannon's argument fails.

2. RICO CONSPIRACY

Section 1962(d) of 18 U.S.C. provides that "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section. In this case, Cannon was charged with and convicted of having conspired to violate 18 U.S.C. § 1962(c). Cannon, along with appellant Daly, argues that his RICO conspiracy conviction cannot be sustained because the government failed to prove that he personally committed two RICO predicate acts.[24]

This argument is without merit. As appellants note, this Court in *United States v. Adams*, 759 F.2d 1099, 1116, *cert. denied*, 474 U.S. 971 (1985), held that "to be convicted

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[24] Cannon is joined in this argument by appellant Daly.

of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally these acts." While we recognize that other circuits have taken a different view. See *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom. Rabito v. United States*, 469 U.S. 831 (1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983), appellants have not proffered any justification for this Court to change its current position. Accordingly, being bound by controlling precedent, we find that appellants' argument must fail.

D. DALY

Daly was charged and convicted of bribery of a public official in violation of 18 U.S.C. § 201(b). Specifically, Daly was convicted for having given $100 to Bernard Dillon, an official of the Occupational Health and Safety Administration (OSHA), to cause Dillon to use his authority as an area OSHA Director to order OSHA inspections to harass non-union roofing contractors. Daly contends that there was insufficient evidence to warrant his conviction in that the government did not adequately prove that Daly acted with the requisite corrupt intent. We will review the evidence in the light most favorable to the government to determine if the conviction was proper. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), *United States v. Anderson*, 859 F.2d 1171, 1175 (3d Cir. 1988).

In relevant part, 18 U.S.C. § 201(b) provides: "Whoever- (1) directly or indirectly, corruptly gives, offers, or promises anything of value to any public official . . . with intent- (A) to influence any official act . . . shall be . . . imprisoned for not more than fifteen years.

This statute has been said to require that the alleged briber offer the bribe with a "corrupt intent" to influence official conduct. *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir.), *cert. denied*, 471 U.S. 1139 (1985). This requires the government to show that the "money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced." *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980). Provided that the money is offered with corrupt intent, "the official does not necessarily even need to be aware of the bribe . . . so long as a bribe is offered or promised with the required intent to influence any official act the crime is committed." *Id.* (citation and internal quotations omitted.)

We find that there was sufficient evidence from which the jury could find the required corrupt intent on the part of Daly. A conversation intercepted on October 23, 1985 between Daly and Traitz, Jr. revealed that Daly delivered $100 to Dillon; Daly paid this money from his personal funds and was reimbursed from the union safe. Later in the same conversation, it became clear that Daly knew that other members of the Roofer's Union had met and would continue to meet with Dillon and that Dillon would continue to receive funds from the Roofers. In addition, in a coversation taped on November 11, 1985, Daly and several other Roofer's Union officials stated that Dillon should be called so he can "chase" away some non-union contractors from a job site. While this conversation is not direct evidence of Daly's intent at the time he delivered the payment to Dillon, it is certainly circumstantial evidence that Daly understood Dillon was given money in order to harass non-union contractors.

Daly would have this Court conclude that he believed that he was delivering the funds simply as an expression of a "general desire to cultivate and maintain a close relationship with Dillon." This contention is not supported by the facts. We conclude that, taking the evidence in the light most favorable to the government, the jury could infer that Daly had the requisite corrup intent. Accordingly, Daly's challenge to the sufficiency of the evidence is without merit.

E. NUZZI

Appellant Nuzzi was charged with and convicted of two counts of having traveled in interstate commerce in aid of a racketeering enterprise in violation of 18 U.S.C. § 1952. Specifically, Nuzzi was convicted of having traveled from Philadelphia, Pennsylvania to Camden, New Jersey in order to bribe New Jersey Sheriff William Simon and New Jersey Deputy Sheriff Norbert Zuchowski. Nuzzi argues that the evidence was insufficient to warrant his conviction on either of the two counts charged. We must review the evidence in the light most favorable to the government to test its sufficiency. *United States v. Anderson*, 759 F.2d 1171, 1175 (3d Cir. 1988).

Section 1952 of Title 18 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce . . . with intent to –
>
> * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and

> (3), shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery or arson in violation of the laws of the state in which committed or of the United States.

In this case, it is New Jersey, i.e. the state in which the bribery was committed, which supplies the applicable definition of bribery.

In accordance with our earlier discussion, to be guilty of bribery under New Jersey law the government had to introduce evidence that Nuzzi knowingly offered, conferred or agreed to confer a benefit upon the New Jersey officers with the intention that the benefit influence the officers in the exercise of their discretion or induce the officers to violate a known legal duty.

The undisputed testimony of Simon and Zuchowski established that Nuzzi delivered envelopes to each of the officers in New Jersey containing $500 and $200, respectively. Furthermore, evidence was introduced that Nuzzi was aware that "holiday gifts" were being prpared for individuals including Simon and Zuchowski. In addition, in a recorded conversation between Traitz, Jr. and Nuzzi the following statements were made:

> JN: [Nuzzi] I got an appointment with the sheriff. I'm gonna give him the jackets.
>
> ST: [Traitz, Jr.] Okay.
>
> JN: And the guy that wants the brickwork, how do you want, what do you want to do with that?
>
> ST: Who wants it?

JN: Zuke . . . his, the guy under him.

ST: Get it done.

* * *

JN: Alright, I'll tell him that too, (UI) now what should I ask Simon anything about my thing or . . .

ST: Not a thing. Just say, "I feel bad."

JN: Just . . .

ST: Say I was there, with two of my guys. I tried to get 'em out.

JN: Hmmm-huh.

ST: Wound up. I got *** involved. . . . I had nothing to do with it. He's tonin' it down. I had nothing to do with it.

JN: The charge I got that what it looks like.

ST: Right.

JN: As long as they don't try *** make something out of it.

ST: They won't, they won't now. They won't now because Simon's on it.

JN: Okay.

* * *

JN: Long as this don't get no worse, everything will be okay. Hopefully, Simon will keep it the way it is.

ST: Ah, he's got it toned down.

JN: All right.

> ST: You go ahead over and give him my best. Invite him and "Zuch," the 23rd, I got a nice luncheon for all our friends and all Labor will be there. Everybody that's anybody in Labor will be down there.

We find, based on the evidence, that the jury could reasonably have determined that Nuzzi knowingly delivered the money to the officers in the hope, *inter alia*, that the officers would give Nuzzi assistance with charges which were then pending against him. Thus, we conclude that the government proved all the necessary elements to establish that Nuzzi committed bribery as defined under New Jersey law and, given Nuzzi's undisputed travel from Pennsylvania to New Jersey to deliver the bribes, that Nuzzi was guilty of traveling in interstate commerce in aid of racketeering in violation of 18 U.S.C. § 1952.

F. STEPHEN TRAITZ, III, JOSEPH TRAITZ AND RICHARD SHOENBERGER

During the course of the trial, approximately 500 character witnesses were called on behalf of appellant Stephen Traitz, Jr. These witnesses were typically called in groups of 10-20 persons. Defense counsel for Steven Traitz, Jr. asked one such group of witnesses: "Are you aware of any violence perpetrated by members of the union in furtherance of a union goal." On cross examination, the attorney for the government requested that one of the witnesses, William C. Kulzer, step forward from the group. The attorney for the government then asked Kulzer: "Did you employ an individual named Bob Kraisyak?" Kulzer answered: "Yes." The government attorney then asked Kulzer: "Wasn't he a victim of an

assault by Stephen Traitz, III, Joseph Traitz and Richard Shoenberger." Kolzer answered: "That's what was reported."

Immediately after the question was asked and answered, counsel for Steven Traitz, Jr. objected. After a brief discussion, the district judge instructed that the statement be stricken from the record and instructed the jury to ignore the statement.

Appellants Traitz, III, Traitz and Shoenberger claim that the statement by Kulzer, even though stricken, unfairly prejudiced the appellants. The appellants ask this court to grant the three men a new trial. Under third circuit precedent where, as here, an improper statement is uttered within the jury's hearing, a new trial must be awarded unless "it is highly probable that the error did not contribute to the judgment." *Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976).

After reviewing the relevant evidence, we believe that it was highly probable that the single statement by Kulzer did not contribute to the eventual guilty verdicts rendered by the jury against the appellants. Each of the three appellants was found guilty of both a substantive RICO count as well as one count of RICO conspiracy. In addition, each appellant was convicted of several counts of Hobbs Act extortion and extension of credit by extortionate means, to wit: Traitz, III: fours counts of Hobbs Act extortion and three counts of extension of credit by extortionate means; Traitz: six counts of Hobbs Act extortion and five counts of extension of credit by extortionate means; Shoenberger: seven counts of Hobbs Act extortion

and six counts of extension of credit by extortionate means.

Appellants do not contend that Kultzer's testimony related to any of the specific counts upon which they were convicted or prejudiced them as to any of the specific counts. Rather, their complaint seems more generically to be that Kulzer's testimony put the appellants in a bad light before the jury. In this case, the jury, in a trial that lasted over two months, heard the testimony of numerous witnesses and heard tape recordings where either one, two or all of the three appellants were participating in meetings where violent acts against union contractors were taking place or were discussing past or future violent acts. On these facts and taking into account the timely curative instruction given by the district judge, we conclude that it is highly probable that the jury would have convicted the appellants without the testimony of Kulzer.

G. MEDINA

Medina was convicted of eight counts of mail fraud, thirteen counts of Hobbs Act extortion, ten counts of collection of credit by extortionate means, one count of racketeering and one count of RICO conspiracy. Medina claims that the district court erred in (1) admitting certain statements of co-conspirators; (2) allowing the jury to hear tape recorded statements speaking to Medina's alleged drug habit; and (3) allowing the government to use evidence of his prearrest silence against him. We will deal with each of these contentions in turn.

1. ADMISSION OF CO-CONSPIRATORS STATEMENTS

As an exception to the hearsay rule, Federal Rule of Evidence 801(d)(2)(E) provides in relevant part, "A statement is not hearsay if [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." To admit evidence under this exception a three-prong test must be satisfied. First, there must be evidence establishing the existence of the conspiracy and connecting the declarant and the defendant to it. Second, the statement must have been made in furtherance of the conspiracy. Third, it must have been made during the course of the conspiracy. *United States v. Pecora*, 798 F.2d. 614, 630 (3d Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987).

Medina contends that two sets of statements were improperly admitted because these statements were not "in furtherance of" any conspiracy. "Because this question involves the application of legal precepts to the facts surrounding he conversations, our review is plenary." *Id.*

a. STATEMENTS BY APPELLANT TRAITZ, JR.

On October 31, 1985, Medina, Crosley, Schoenberger and Osborn were meeting with a contractor named Willie Brailsford in the business agents meeting room. At the same time, Traitz, Jr., Hurst and Danny McBride were meeting in Traitz, Jr.'s office which was adjacent to the meeting room. After several minutes, Medina entered Traitz, Jr.'s office and requested that an agent go with him

into the meeting room. Hurst then accompanied Medina back into the meeting room.

Moments later, hearing screaming from the meeting room, Traitz., Jr. began discussing with McBride the activities which take place in the meeting room. Traitz, Jr. stated: "He [Medina] was killing a guy in there one *** day . . . Yo! I love it . . . I love it."

Medina's sole contention is that this was only a casual statement made in the course of a conversation between co-conspirators about past events and as such did not satisfy the "in furtherance requirement." We do not agree. While it is true that a casual conversation between co-conspirators does not meet the "in furtherance requirement," *United States v. Gibbs*, 739 F.2d 838, 845 (3d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), "statements between co-conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy and are admissible so long as the other requirements of Rule 801(d)(2)(E) are met." *United States v. Anmar*, 714 F.2d 238, 252 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983).

Properly viewed, Traitz, Jr.'s statements provided reassurance to McBride that he approved of the violent means used against contractors to attain desired union ends. Moreover, the statements served to inform McBride of the nature of the union's extortionate activities. As such these statements can be said to be "in furtherance of" the conspiracy charged; i.e. the conspiracy to violate 18 U.S.C. § 1962(c).

b. APPELLANT CROSLEY'S STATEMENT

On October 18, 1985, a conversation between Crosley and Edmund Gregory was intercepted. In this conversation the two men discussed that Medina was involved in a hit-and-run accident. Crosley also stated that Medina had a gun in the car at the time of the accident and that Medina was involved in a "drug thing." Finally, Crosley stated: "But regardless of all that, we reported it [the car] stolen."

Medina claims that this was merely a narrative of past events and was not "in furtherance of" the conspiracy. Again, we disagree. Crosley's statements to McBride provided McBride with information as to the current status of the conspiracy. *United States v. Anmar*, 714 F.2d at 252. Medina's accident and the subsequent false reporting of the car's theft to the insurance company provided the basis for Medina's mail fraud convictions. That these actions were considered to be within the ambit of the Roofer's Union's illicit enterprise is evidence by Crosley's reference to the fact that "we" reported the car stolen. Moreover, there was evidence that it was part of the plan and purpose of the conspiracy to falsely report the theft of the car driven by Medina and several of the overt acts charged as part of the conspiracy involved the false reporting of the car's theft. Thus, providing information to a co-conspirator about Medina's accident and the false reporting of the car's theft is properly considered "in furtherance of" the conspiracy.

2. INADMISSIBLE TAPE RECORDINGS

Medina claims that his convictions should be reversed because the government was permitted to

introduce and play for the jury, four tape recorded conversations in which Medina's alleged drug habit is discussed. Specifically, tapes played to the jury revealed: (1) that FBI agent Tamm told Santina Collins that Medina was a "cocaine user and a drunk driver;" (2) that Traitz, Jr. told other business agents "[d]on't put anybody that fools with drugs in the union car 'cause we got a bad problem with this car now;" (3) that Traitz, Jr. told Medina that FBI agent Tamm told Collins that Medina was a "cocaine user;"[25] and (4) that Traitz, Jr. told other business agents that Medina was suspected of using drugs.

The district court allowed each of the tapes to be played in full, denying Medina's request that the portions referring to drugs be removed. The district court did, however, caution the jury that: "This case does not concern drugs. There is nothing to do with drugs that is charged against Medina or really, it has nothing to do with the charges against Mr. Medina."

When improper statements are uttered within the jury's hearing, a new trial must be awarded unless "it is highly probable that the error did not contribute to the judgment." *Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). While the several statement regarding Medina's alleged drug use may well have been improperly admitted, we nevertheless conclude that it is highly probable that their admission did not contribute to the judgment of the jury.

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[25] After the tape in which this statement is contained was played to the jury, the district judge stated, "this statement is hearsay and it is stricken. It is evidence you should not consider in any way, shape or form."

Medina was not charged with any drug offense. Thus, the root of appellant's objection is that the introduction of evidence of his substance abuse impugned his character and may have lead the jury to convict him because of what they perceived to be his bad nature.

This argument is belied by the facts. In the course of this lengthy trial, numerous witnesses testified about the mail fraud charges and about Medina's violent and threatening behavior concerning the extortion of contractors. Indeed, over 40 tape recorded conversation were introduced in which Medina is a speaker and either the mail fraud scheme or extortion of contractors is the subject. Given the overwhelming evidence, we conclude that it is highly probable that the evidence concerning Medina's drug abuse did not prejudice him in any way.

3. PREARREST SILENCE

Michael Ebner, a Philadelphia Police Officer assigned to the accident investigation division, testified as to his investigation of the June 21, 1985 hit-and-run accident in which Medina was ultimately implicated. In the course of his testimony, Ebner stated that although he attempted to talk to Medina he was never able to meet and speak with him regarding the accident. Medina claims that Ebner's testimony is, properly viewed, a comment by Ebner as to Medina's prearrest silence in violation of Medina's fifth amendment right against self incrimination.

The threshhold question which must be addressed is whether, given that Ebner never actually contacted Medina, Ebner's testimony is a comment about Medina's prearrest silence. "A comment is deemed to be a reference

to a defendant's silence if either: (1) it was the prosecutor's manifest intention to refer to the defendant's silence; or (2) the remark was of such a character that the jury would 'naturally and necessarily' take it to be a comment on the defendant's silence." *United States v. Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986), *cert denied*, 480 U.S. 919 (1987). The burden of proving that a comment was designed to speak to the defendant's prearrest silence is on the defendant, *Id.*

In this case, Ebner's comments were not a reference to Medina's prearrest silence. The government argues that the testimony in question was elicited merely to show the steps which Ebner took in investigating the hit-and-run accident. Medina has not offered any contrary evidence and we therefore find that the prosecutor did not manifestly intend to comment on Medina's prearrest silence. In addition, the fact that Ebner was unable to contact Medina is not of such a nature that the jury would naturally and necessarily take it to be a comment on Medina's silence. Thus, Ebner's comments did not amount to a statement concerning Medina's prearrest silence and, accordingly, we conclude that Medina's fifth amendment right against self-incrimination was not impugned.[26]

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[26] Medina contends that hearsay evidence was improperly admitted implicating him as the driver of the hit-and-run vehicle.We find that the introduction of this evidence was, if error, harmless. This fact was established beyond realistic dispute by the introduction of other evidence. First, an eyewitness identified Medina in court as the driver of the hit-and-run vehicle. Second, a tape recording was introduced into evidence in which Medina admitted to Traitz, Jr. that he had been

(Continued on following page)

IV. CONCLUSION

Having examined all of the arguments of the appellants and having reviewed all the relevant evidence we conclude that the judgments of conviction and sentening in each case will be affirmed.

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Clerk of the United States Court of Appeals
for the Third Circuit

(Continued from previous page)

involved in the hit-and-run accident and that at the time of the accident he both had a gun in the car and was under the influence of alcohol. Third, evidence was admitted that Medina was convicted in a Pennsylvania state court proceeding for having been involved in the hit-and-run. Given all this evidence any error which might be said to have occurred is properly found to be harmless.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE THE INTERCEPTION OF ORAL COMMUNICATIONS	:	MISCELLANEOUS NO. 85-2012

ORDER

AND NOW, this 25th day of June, 1987, it is hereby ORDERED that defendants' motions to suppress are DENIED.

BY THE COURT:

/s/ James T. Giles, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERM DISTICT OF PENNSYLVANIA

APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE THE INTERCEPTION OF ORAL COMMUNICATIONS	: MISCELLANEOUS NO. 85-2012

MEMORANDUM AND ORDER

GILES, J. JUNE 25, 1987

I. *THE SEPTEMBER 23, 1985, ORDER*

On September 23, 1985, this court by order authorized electronic surveillance of oral communications for a period of thirty (30) days occurring at the Business Manager's Office and the Business Agent's Meeting Room of the Roofers' Union, Locals 30/30B, 6447 Torresdale Avenue, Philadelphia, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518. The authorization was in furtherance of an investigation by the Federal Bureau of Investigation (FBI) into possible violations of the Racketeer Influenced and Corrupt Organizations Act, (RICO) 18 U.S.C §§ 1961-1968 (1976). At paragraph 5(a) of the sworn Affidavit of FBI Special Agent Quinn John Tamm, Jr., which was incorporated by reference in the Application of the United States Attorney for the Eastern District of Pennsylvania (¶ A), it was stated that:

> 5. The facts and circumstances of this investigation as set forth below show that:
>
> (a) There is probable cause to believe that Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, Robert Medina, James Nuzzi, Stephen Traitz, III and

> other [sic] as yet unknown, associated in fact as an enterprise as defined in section 1961(4), Title 18, United States Code have committed and are conspiring to commit offenses, in the conduct of said enterprises [sic] affairs, involving interstate transportation of stolen property, mail fraud, extortionate collections of credit, and an illegal gambling enterprise, (racketeering) in violation of Title 18, United States Code, sections 1962(c) and (d) 1963, 2314, 1341, 894 and 1955.

Based upon the information contained in the Application and incorporated Affidavit, the court concluded that the triggering requirements had been met for authorizing interception of oral communications pursuant to 18 U.S.C. § 2518 and directed that the surveillance be conducted in accordance with the statute. Specifically, the court found that

> a) There is probable cause to believe that Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, James Nuzzi and Robert Medina and others yet unknown, have committed and are committing offenses prohibited and punishable under (1) section 1962(c) and (d) and 1963 of Title 18 United States Code (involving, conducting or participating in the conduct of the affairs of an enterprise that engages in, or the activities of which affect interstate commerce, through a pattern of racketeering activity and conspiracy in connection therewith) and (2) section 1955 of Title 18 United States Code, mainly prohibition of business enterprises of gambling and the conspiracy to do so, section 894 of Title 18, United States Code, namely collection of extensions of credit by exortionate means and the conspiracy to do [so], and section 2314 of Titie 18, United States Code, namely the interstate transportation of stolen property and the conspiracy to do so.

Defendants have challenged this authorizing order as invalid on numerous grounds, chief among them, assertedly, the absence of probable cause, and seek suppression of evidence gathered through the initial interception, and all subsequent, similar orders, and fruits thereof, as the products of illegal search and seizure. The challenges are without merit for the reasons set out below.

A. *Probable Cause*

The wiretap application must show probable cause that (1) an individual has or is about to commit the particular enumerated offenses; (2) particular communications relating to the charged offense will be obtained through the interception; and (3) the premises where the interception will be be made are being used in connection with the charged offense. *United States v. Armocida*, 515 F.2d 29, 35 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); 18 U.S.C. § 2518(3)(a), (b) and (d).

In reviewing the sufficiency of the representations and evidence in the Application and Affidavit for "probable cause," the issuing court must determine whether under the totality-of-the-circumstances test the facts warranted the conclusion of probable cause. *See Illinois v. Gates*, 462 U.S. 213, 230-39 (1984); *Massachusetts v. Upton*, 466 U.S. 727, 732 (1984). In doing so, it must be remembered that only the probability standard, and not the *prima facie* showing or proof beyond a reasonable doubt standards, is applicable to probable cause. *Illinois v. Gates*, 462 U.S. at 230-39. A reviewing court is obligated to accord great deference to the initial finding and apply commonsense meanings to words in deciding whether

there existed a substantial basis for probable cause. *Id.* at 236, 238-39. Here, the Government supplied a factual basis that dictated the conclusion of probable cause.

The operative factual assertions contained in the Tamm Affidavit are ascribed to two confidential informants whose reliability for accuracy of information was corroborated by the FBI through independent investigation and by their past history of providing reliable information. Their reliability was further reasonably established to the satisfaction of the court through the details of their accounts and their opportunities for personal observation. Their accounts connected the instances of probable violations of the referenced criminal statutes to the Roofers' Union and particularly to the rooms designated in the order for interception.

1. *Stealing and Moving Non-Union Contractor Equipment and Material Across State Lines and for Unlawful Organizational Purposes.*

Confidential informant CSN-1 had a proven reliability record through providing the FBI with information for a period of six (6) months. (Affidavit of Quinn John Tamm, Jr. (Affidavit, ¶ 4(a)). Further, the court was informed that CSN-1 had participated *directly or indirectly* in the criminal activity reported in the Affidavit as to which the informant was the information source.

CSN-1 advised the FBI that he is personally familiar with James Nuzzi, Roofers' Local 30 Business Agent, Mark Nuzzi, his brother and member of Roofers' Local 30, and Michael Campana, an associate of the Nuzzi brothers. (Affidavit, ¶ 13, p. 9). CSN-1 stated that he had

learned that James Nuzzi locates non-union roofing contractors and attempts to organize them; if the company declines to sign a union contract, James Nuzzi directs Mark Nuzzi and others to steal the equipment and material to harass the company into signing a contract; and that the stolen equipment and material are sold to union contractors who are contacted from the Business Agent's Meeting Room by Robert Medina, James Nuzzi and other Roofers' Business Agents. (Affidavit, ¶ 13, p. 10).

The fair inference from CSN-1's statements to the FBI is that he participated directly or indirectly in the specific events related. The considerable detail of those accounts evidence substantial reliability and veracity.

On March 21, 1985, CSN-1 advised the FBI that Mark Nuzzi had stolen a Garlock conveyor from a non-union roofer in Bordentown, New Jersey, and that the theft was directed by James Nuzzi and another business agent of Roofers' Local 30. (Affidavit, ¶ 13, p. 9). Independent investigation by the FBI showed that the information as to theft of this particularly described equipment by Mark Nuzzi from a non-union New Jersey contractor was absolutely correct. The theft was verified through the New Jersey State Police. On April 15, 1985, at approximately noon, Special Agents of the FBI observed the stolen Garlock conveyor, description verified by the State Police, being towed by a black truck through Gloucester Township, New Jersey. The truck was registered to, and was driven by, Michael Campana. Mark Nuzzi was a passenger.

The FBI observed the Garlock conveyor being towed to Bensalem, Pennsylvania, where it was parked in a

fenced area on the property of ACC Roofing, a roofing contractor different from the victim of the theft. Mark Nuzzi then drove a car from that contractor's property which was registered to ACC Roofing and proceeded south on Route 13. Twenty (20) minutes later he returned to the contractor's property. Then Mark Nuzzi and Campana departed in Campana's truck leaving the stolen Garlock conveyor in Bensalem, Pennsylvania, and traveled to Campana's house in Erial, New Jersey. Shortly after arriving there, Mark Nuzzi departed Campana's house driving a car registered to James Nuzzi in Marlton, New Jersey. (Affidavit, ¶ 13, p. 10). At some point in time on March 22, 1985, the day of transport of the stolen Garlock conveyor across state lines, the FBI observed Mark Nuzzi at the Roofers' Local 30 Union Hall. (Affidavit, ¶ 13, p. 9).

From CSN-1, the court had before it a reliable account of planning by business agents within the premises of Roofers' Local 30/30B for the theft of non-union roofing contractor equipment to harass and coerce through unlawful means such contractors to execute contracts with Local 30.

On April 15, 1985, CSN-1's reliability was further bolstered by his providing information to the FBI that Mark Nuzzi, Michael Campana and another individual stole nineteen (19) rolls of rubber roofing material worth $1500 per roll from a non-union contractor at the site of the Pleasant Valley High School in Monroe County, Pennsylvania. The stolen rolls of rubber were loaded onto a dump truck owned by friends of Campana. The remaining roofing material and the roofing material at the job site were then set on fire and destroyed by the three

individuals. CSN-1 was able to tell the FBI precisely where the stolen materials had been stored – behind a home on Broad Lane Road in Williamstown, New Jersey. Through contacts with the Pennsylvania State Police, the FBI confirmed that a fire was set at the Pleasant Valley High School.

The extensive detail of this account strengthened the court's conclusion of CSN-1's credibility and reliability, in general, and, in particular, reliance on the representation by the FBI that CSN-1 had been directly or indirectly involved in the theft and destruction of the rubber roofing material and the theft of the Garlock conveyor.

CSN-1's account that business agents of Roofers' Local 30 were involved in a practice of stealing non-union contractors' equipment and material for unlawful purposes of coercion and harassment was corroborated by an account of a statement heard by confidential informant CSN-2 at the Roofers' Union, Local 30, attributed to Stephen Traitz, Jr., the Business Manager of the Union.

On June 14, 1985, CSN-2, who was described as having a "personal association with the principals" of the proposed oral communications interception, including Stephen Traitz, Jr. (Affidavit, ¶ 4(b), p. 3), reported to the FBI that during the week of June 10, 1985, Traitz, Jr. met with his subordinate business agents, individually in his office, the Business Manager's Office, and in the Business Agent's Meeting Room, to determine if there was a "leak" amongst the professional staff at Roofers' Local 30 because of a concern that area law enforcement officials appeared to have advance information about violent acts

to be committed by members of Local 30. (Affidavit, ¶ 17, p. 17).

It was clear from the Affidavit that CSN-2's personal association with Traitz, Jr. included personal conversations with him. CSN-2 told the FBI that Stephen Traitz, Jr. told him and others that he was going to try to "fix" a criminal assault case pending against his son, Stephen Traitz, III, Union business agent, in Montgomery County, Pennsylvania through contacts he had with the Montgomery County District Attorney's office. (Affidavit, ¶ 17, p. 13). Stephen Traitz, III had been charged with a May, 1985, aggravated assault on a roofing contractor in Ambler, Pennsylvania. (Affidavit, ¶¶ 10, 17). The statement by Stephen Traitz, Jr., heard directly by CSN-2, evidenced condonation of violence upon roofing contractors by the head of the Union and a willingness to go so far as to subvert the criminal justice system in doing so.

CSN-2 corroborated CSN-1's account of some Local 30 business agents engaging in a pattern of stealing, selling and/or destroying non-union contractor equipment and materials. Independently, he told the FBI that Stephen Traitz, Jr. organizes thefts of roofing equipment and assaults on non-union contractors. (Affidavit, ¶ 17, p. 13). This quality of this statement, and the issuing court's assumed reliance thereon, must be judged in light of the fact that it came from a person who not only personally associates with Stephen Traitz, Jr. and others inside the Union's premises, but who is held in such confidence as to hear first-hand Traitz, Jr.'s statement of intent to try to "fix" an aggravated assault case involving a roofing contractor through a contact in the Montgomery County District Attorney's Office. Traitz, Jr. has been trying to

cultivate that contact for the past several years in the hope that ultimately Roofers' Local 30 would move to Montgomery County from Philadelphia County (Affidavit, ¶ 17, p. 14) where, inferentially, the Local Union's criminal activities could be protected from prosecution through the contact in that office.

The reliability of, and confidence in, CSN-2 as having obtained all the information related through the Affidavit directly or through other directly knowledgeable sources close to the Union Business Agent is again demonstrated by Stephen Traitz, Jr.'s discussing with CSN-2 another matter of a high level of secrecy. This matter regarded a false insurance claim which had been filed with an insurance carrier of Local 30 by the Union and that Traitz, Jr. was trying to protect Business Agent Robert Medina from detection and criminal prosecution for (1) a drunken driving automobile accident in a car leased by the Union, (2) aggravated assault with the car upon the persons whose car was struck by Medina's and (3) a subsequent arson of the car by Medina to cover up the aforementioned crimes.

2. *Mail Fraud as a RICO Predicate Act*

On July 17, 1985, CSN-2 told the FBI that in the week of July 8, 1985 he overheard Medina in the Business Agent's Meeting Room discussing an accident that he had had in an automobile leased from Faulkner Oldsmobile, a car dealer and lessor. CSN-2 related in great detail Medina's conversation, the place of the accident, the circumstances, Medina's efforts to run down the people who followed and confronted him after he wrongfully left the

scene of the accident, his taking the car to a field behind the Hilton Hotel in Bensalem Township and setting it afire after removing the license plate, and his telephoning the Philadelphia Police Department the next day and filing a false report that his car had been stolen from the Local 30 parking lot. On July 22, 1985, CSN-2 told the FBI that Stephen Traitz, Jr. had authorized acquisition of a twelve foot high chain link fence topped by razor wire to attempt to add credibility to Medina's lie to the police and to the Union's lie to the insurance carrier that the car in question was stolen from the Union parking lot and that therefore Medina was not the assailant involved in the car accident and assault. (Affidavit, ¶ 22, p. 17). CSN-2 provided the FBI with such details about the automobile leasing arrangements of the Union, choice of vehicles, license plate numbers, number of insurance policy, names of carrier and insurance agent that his account has to be given a very high degree of reliability.

CSN-2 stated that Medina, after setting the leased car afire, conferred with Business Manager, Traitz, Jr. in the Business Manager's Office as how to handle the problem; that Traitz, Jr. and Medina decided to file an insurance claim with the Centennial Insurance Company; that Traitz, Jr. directed Medina to lease a new car, less flashy than the former from Supreme Leasing Co., Inc., a subsidiary of Faulkner Oldsmobile, to aid the fraudulent activity; that Traitz, Jr. directed the Office Manager to send a letter to the insurance agency advising of the theft and to deal with any inquiries from the Philadelphia Police Department or from any insurance claim adjusters concerning the falsely reported "stolen" car. (Affidavit, ¶ 24, p. 19).

CSN-2, as late as September 5, 1985, reported to the FBI that the cover-up of the false insurance claim was continuing by Traitz, Jr., Medina and other business agents and that these discussions were occurring in the Business Agent's Meeting Room.

CSN-2 even provided to the FBI a floor plan of the Roofers' Local Union Hall premises. (Affidavit, ¶ 31, p. 25).

The FBI through independent investigation corroborated vital and substantial portions of the details of CSN-2's account of the Medina accident and false claim episode. The Supreme Leasing Co. car was identified; the twelve foot high fence was observed; the insurance claim was verified; and the report of the Philadelphia Police Department was found to confirm the report of a stolen car and a hit and run accident on Roosevelt Boulevard in Philadelphia occurring at the time, place and in the manner that CSN-2 had said it had happened. The "stolen" car was found by the Bensalem Police on August 1, 1985, at the place where CSN-2 said it was taken and in the condition that CSN-1 said it was stripped and burned.

The United States mails were used by Stephen Traitz, Jr., Robert Medina and others at the Union Headquarters to perpetrate the fraud and to cover-up Medina's crimes. CSN-2 stated that Stephen Traitz, Jr. is concerned that Medina will be arrested because of his activity and will be unavailable to him as a collector of debts and other strong-arm tactics. (Affidavit, ¶ 22, p. 17). This statement must be regarded as more than a conclusion, given the veracity of CSN-2. It expresses informed knowledge by CSN-1 that Medina was then engaging in such collection

and strong-arm tactics for Traitz, Jr. and that Traitz, Jr.'s interest in fostering the fraud upon the insurance company and the police, acts necessary to conceal Medina's criminal culpability, was to protect a loyal business agent then engaging in the series of other criminal acts.

3. *Gambling Activity Occurring at Local 30 Headquarters*

A. *Stephen Traitz, Jr. and Harry Joseph*

Probable cause was reasonably established for this finding by the reliable statement of CSN-2 to the FBI that on June 14, 1985, Harry Joseph, known to CSN-2 to operate a gambling and loansharking ring in Northeast Philadelphia, told CSN-2 in the Union Hall that he was going to meet with Stephen Traitz, Jr. in the Business Manager's Office. CSN-2 stated that there are weekly meetings between Traitz, Jr. and Joseph in that office for that purpose. (Affidavit, ¶ 15, p. 2). Through conversation with Joseph, CSN-2 learned that the meeting of June 14, 1985, concerned loansharking and gambling. He told the FBI that Joseph utilizes Roofers' Union organizers and members of Local 30 as strong-arms for the collection of loanshark debts and that Joseph routinely arranges through Traitz, Jr. to get money from members of the Roofers' Local 30 who owe Joseph money. Further, CSN-2 stated that Joseph relies upon Stephen Traitz, Jr.'s political connections in Philadelphia to protect his gambling and loansharking operations. (Affidavit, ¶ 16, p. 13).

CSN-2 told the FBI that he has known Stephen Traitz, Jr., Stephen Traitz, III, James Nuzzi, Michael "Nails" Mangini, Harry Joseph and Robert Medina in excess of

ten (10) years and knows that all but Joseph work for Roofers' Local 30 as either officers or business agents. (Affidavit, ¶ 14, p. 12). Further, he knows and has gambled with Alfonzo J. Parisse in the past, a known gambler, and knows him to be associated with the above-named persons. (*Id.*).

The aforementioned confidence shown CSN-2 by Joseph, Traitz, Jr. and Medina, coupled with his detailed personal knowledge of many matters occurring within the inner sanctum of the Business Agent's Office and Business Agent's Meeting Room, and his personal knowledge of Traitz, Jr., Medina and Joseph in connection with gambling activities, lends great credence to CSN-2's statements about the purpose of Joseph's weekly visits to Traitz, Jr.'s office as being factual and based upon either direct personal knowledge or very reliable sources, such as Harry Joseph, to whom he spoke on June 14, 1985.

B. *Stephen Traitz, Jr. and Michael "Nails" Mangini*

CSN-2 stated to the FBI that Mangini is engaged in a sports betting and illegal lottery operation from a Social Club known as the Circle Club at 6055 Castor Avenue in Philadelphia and that Mangini frequently conducts the business of this gambling operation from the Business Agent's Meeting Room at Roofers' Local 30 during the business day. Further, CSN-2 stated that Mangini utilizes shop stewards and other members of Roofer's Local 30 to collect gambling debts from individuals who fail to pay debts timely to Mangini's gambling operation. (Affidavit, ¶ 18, p. 14). This statement has high reliability as based upon personal knowledge, given CSN-2's gambling

knowledge and gambling associations with Mangini and Stephen Traitz, Jr. and with activities occurring at the Union.

On July 17, 1985, CSN-2 stated that within the week of July 15, 1985, he was in the hallway of Roofers' Local 30 and overheard a conversation between Mangini and Stephen Traitz, Jr. which was occurring in the Business Manager's Office. Mangini and Traitz, Jr. were discussing a gambling debt that a member of Roofers' Local 30 owed to Harry Joseph for losses suffered in a high stakes poker game operated by Joseph at various taverns in Northeast Philadelphia and Bucks County, Pennsylvania. Traitz, Jr. told Mangini that he was in the process of collecting the debt from a member of the Local.

This conversation has significance in that Mangini, a business agent of Roofers' Local 30, is then engaged in collecting a debt owed to Harry Joseph by a Union member and has a purpose in letting Stephen Traitz, Jr. know about that gambling debt and his collection efforts. This conversation must be treated in the context of CSN-2's earlier statement that Stephen Traitz, Jr. participates in Joseph's loansharking and gambling ring and Joseph routinely contacts Traitz, Jr. to collect money owed him from members of Local 30 who owe money. It was probable, therefore, that the Mangini-Traitz, Jr. conversation in the week of July 15, 1985 concerned the collection of a gambling debt through Union auspices and agents. Indeed, Mangini is a Union business agent.

4. *Collection of Gambling or Loansharking Debts by Traitz, Jr., Mangini and Joseph*

On August 30, 1985, CSN-2 was in the presence of Stephen Traitz, Jr., Robert Medina and several other business agents when there was discussion by Traitz, Jr. of the false insurance claim and attempts to foil and frustrate the police investigation of the accident. Traitz, Jr. stated that he and the other business agents who knew what actually happened would not cooperate in the investigation (Affidavit, ¶ 24, p. 24) and that the Union would continue to pursue the insurance claim. Importantly, also present during this discussion of fraud and intent to defraud were Mangini, and James Nuzzi, and probably Harry Joseph. This conversation evidenced Stephen Traitz, Jr.'s control over the other business agents in the fraud and cover-up and that Mangini and Nuzzi were confidants and, by commitment to silence, were willing participants in the fraudulent conspiracy to collect on the car insurance and to protect Medina. In the course of that dialogue, Joseph stated to Mangini and Traitz, Jr. that he wanted to talk to them about some "business" which Joseph said concerned the collection of money. Joseph is not a Union business agent. The three went into the Business Manager's Office and shut the door. That session lasted about thirty (30) minutes. (Id.).

The totality of the circumstances including the proven reliability of CSN-2 warranted the conclusion that as of August 30, 1985, there was continuing a pattern of the conduct of gambling activities through the Union and the collection of unlawful debt from Union members by Traitz, Jr. Mangini and Joseph and as aided by Medina, Nuzzi and others.

B. *The Three Pronged Test Under Title III Was Met*

The three pronged test set out in *United States v. Armocida*, 515 F.2d at 35, requires a showing that the individuals are probably engaged in the specified types of criminal conduct, that conversations concerning such offenses probably will be intercepted and the premises where interception will occur are probably being used for the suspected offenses.

As can be readily seen from the foregoing gleaning of the Application/Affidavit, the criminal activities at issue were shown to be planned in the Business Manager's Office and/or the Business Agent's Meeting Room.

1. *Interstate Transportation of Stolen Property*

The Affidavit listed two events of interstate transportation of stolen property occurring in the Spring of 1985 which were alleged by CSN-1 to have been perpetrated by Mark Nuzzi at the direction of his brother James Nuzzi, a business agent and organizer for Roofers' Local 30. Independent investigation corroborated the details of both thefts and placed Mark Nuzzi at the offices of the Roofers' Union on the day the stolen property was brought across state lines. According to CSN-1, the Business Agent's Meeting Room in the Union offices was used by James Nuzzi and Robert Medina to contact persons to purchase the stolen equipment and roofing materials. According to CSN-2, both James Nuzzi and Medina were employed at the Roofers' Union offices. Finally, according to CSN-2, Stephen Traitz, Jr. had been meeting with business agents in his own office and the Business Agent's Meeting Room to discuss the possible leak of information

concerning thefts of roofing equipment from non-union roofers. Three named interceptees (Traitz, Jr., James Nuzzi, and Medina) were linked to the suspected criminal conduct and conversations concerning the conduct to the two locations within the Union offices where authorization to intercept communications was sought.

2. *Gambling and Debt Collection*

Information to support the allegations of suspected gambling activity in violation of 18 U.S.C.§ 1955 and extortionate debt collection in violation of 18 U.S.C.§ 894 was supplied by CSN-2 based on first hand knowledge. This information provided support for the belief and finding of probable cause that Harry Joseph and Michael "Nails" Mangini, were associated with gambling enterprises involving sports betting, illegal lottery and poker and that Stephen Traitz, Jr. lent support to the operation by supplying organizers and union employees to collect gambling and loansharking debts using strong-arm tactics. Conversations among these three interceptees (Traitz, Jr., Joseph, and Mangini) to plan and discuss these criminal activities were alleged to have occurred in Traitz, Jr.'s office on June 14, 1985, during the week of July 15, 1985, and on August 30, 1985. Accordingly, the named interceptees were linked to criminal offenses and conversations concerning the offenses in the Business Manager's Office and Business Agent's Meeting Room at the offices of the Roofers' Union. The gambling activity involved sports betting, illegal lottery and high stakes poker. At least four persons were named as being involved, including Joseph and Mangini as managers, Traitz, Jr. as a supervisor of debt collection and Medina as

a debt collector. A reasonable inference can be drawn from paragraphs 15 and 18 of the Affidavit that other Union officials, organizers, shop stewards and loyal Union member employees also were involved in debt collection. Accordingly, the Affidavit established probable cause that five or more persons were involved or associated with the gambling enterprise. The span of time of the conversations (June 14 to August 30, 1985), coupled with the historical data of Mangini's and Joseph's long-time gambling activities and the information of weekly meetings between Joseph and Traitz, Jr., supported a finding that the gambling enterprise had been in continuous existence for at least thirty days (30) and was continuing "business as usual" as of August 30, 1985.

3. *Extortionate Collection of Debt*

Similarly there was sufficient information in the Affidavit to satisfy the elements of extortionate debt collection, 18 U.S.C. § 894, despite the fact that no specific instances of collection were described. This information was supplied by CSN-2 who stated that Harry Joseph was involved in loansharking, a term connoting extortionate lending and threats of violence for non-repayment of debts. See *United States v. Dennis*, 625 F.2d 782, 799-80 (8th Cir. 1980). CSN-2 averred that Joseph, aided by Traitz, Jr., engaged Roofers' Union organizers and members to use strong-arm tactics to collect debts. This conduct alone would constitute a violation of § 894. Moreover, the scope of § 894 encompasses a debt arising from a gambling transaction as well as loansharking activity. *United States v. Schwartz*, 548 F.2d 427, 428-429 (2d Cir. 1977). Finally,

there was information in the indictment that Medina was a "collector of debts and [for] other strong arm tactics."

Accordingly, the Affidavit contained sufficient information for a finding that extortionate means were being employed to collect various debts at the direction of Harry Joseph, Michael "Nails" Mangini, and Stephen Traitz, Jr. and that conversations during which these activities were planned and discussed were occurring in Traitz, Jr.'s office.

4. *Mail Fraud*

The informant, CSN-2, linked Robert Medina and Stephen Traitz, Jr. to the false insurance claim and established knowledge in other officials including Michael "Nails" Mangini, and James Nuzzi to the true details of Medina's traffic accident and the false reports to the police and insurance company. Traitz, Jr. participated in conversations concerning this criminal activity in the Business Agent's Meeting Room during the week of July 8, 1985, at other times in July 1985, and on August 30, 1985. CSN-2 reported a conversation between Medina and Traitz, Jr. in the presence of Mangini, Nuzzi and Joseph during which Traitz, Jr. stated that the false insurance claim would be pursued and no official of the Union would cooperate with any investigation by the police. (*See* Affidavit, ¶ 30A). The information contained in the Affidavit linked all the named interceptees to the suspected criminal conduct and conversations concerning the conduct in the Business Agent's Meeting Room in the Roofers' Union offices.

C. *The Criminal Conduct Was Continuing*

Defendants have argued that the criminal conduct covered by the Affidavit was completed and not the proper subject of Title III electronic surveillance. That claim is frivolous. For example, the mail fraud was continuing as of September 23, 1985, and the cover-up in support of the scheme was being enforced among Union officials who knew the truth. The mail fraud offense itself was evidence of the existence of a series of other criminal acts and that the Roofers' Union was probably being operated and controlled by individuals for racketeering purposes. The crime was far from completed, and in this unique circumstance there was no evidence available to link the crime to the Union officials. The false insurance claim had not been paid. No evidence existed, other than from an informant source, linking Traitz, Jr. of Medina to knowledge of the falsity of the claim. Finally, there were indications from CSN-2 that other officials and employees with knowledge of the crime would refuse to cooperate with law enforcement authorities. Accordingly, neither the investigation nor the crime were complete, and the electronic surveillance was sought legitimately to investigate racketeering activities which included a mail fraud scheme.

D. *The Information in the Affidavit About Criminal Activity Was Not Stale*

1. *The Garlock Conveyor*

For the reasons discussed above, the Garlock conveyor episode was continuing as an unsolved crime as of September 23, 1985.

2. *The Pleasant Valley High School*

Defendants challenge the Pleasant Valley High School incident as one that must be presumed stale because it does not have a transactional date. This challenge is rejected because the crime remained unsolved as of the Application date even though the FBI was aware that the material stolen had been sold to a union contractor. Indeed, the crimes committed at that site to this day remain unsolved, and the investigation is continuing. Sometime in 1986, the FBI learned that the stolen materials had been sold. This knowledge obviously was not available in September, 1985, and, even if known, the information would have shown the need for continued investigation, not a cessation, because another crime of selling the stolen goods was occurring. The subject matter was current, not stale. Further, had it been known, it would have been consistent with CSN-1's information that the stolen goods were being sold by Roofers' Local 30 business agents to union contractors. In June, 1985, Traitz, Jr. was said by CSN-2 to have discussed with the business agents a possible leak among the professional staff related to disclosure of plans for violent acts and theft against non-union contractors. (Further, there was an on-going effort by Traitz, Jr. to "fix" his son's aggravated assault case in Montgomery County. That alleged assault was against a non-union contractor and cultivation of that source in the District Attorney's Office willing to "fix" aggravated assault charges was tied to Traitz, Jr.'s plans to move Local 30 to Montgomery County. There was probable cause to believe not only that violent acts against non-union contractors had occurred and were likely to recur within thirty (30) days of the grant of the

order, but there was probable cause to believe that Traitz, Jr. and Local 30 business agents were adopting, condoning and perpetuating such tactics as a standard organizing tool.

3. *The Gambling Activity*

On September 5, 1985, CSN-2 told the FBI that on August 30, 1985, he heard Harry Joseph say to Traitz, Jr. and Mangini that the three of them had to have a private meeting about the "business" of collecting money and there then was a meeting in the Business Manager's Office. On July 17, 1985, CSN-2 heard Mangini, Business Agent, tell Traitz, Jr. in the Business Manager's Office that he was then involved in collecting a gambling debt for Harry Joseph that one of the Union members sustained through a high stakes poker game operated by Joseph. On June 14, 1985, Joseph was at the Union Hall for his weekly meeting with Traitz, Jr. for discussion of Traitz, Jr.'s participation in Joseph's gambling and loansharking business. CSN-2 reported that Joseph routinely contacts Traitz, Jr. to use Union organizers and loyal Union members to collect loanshark debts and Traitz, Jr. arranges to collect money for gambling debts from Local 30 members for Joseph.

These statements taken together showed continuous activity in gambling and collection of unlawful debt tied to Harry Joseph who allegedly was operating a gambling and loansharking ring in Northeast Philadelphia. Joseph, in turn, was stated by the FBI to be closely associated with Alfonzo J. Parisse. Parisse has an extensive prosecution record for gambling and loansharking (Affidavit, ¶ 9,

p. 7) and has engaged in gambling with CSN-2. (Affidavit, ¶ 14, p. 12). Further, CSN-2 knew Parisse to be associated through gambling with Joseph, Traitz, Jr., Mangini, Medina and Nuzzi. (Id.). While a Local 30 Business Agent, Mangini, was operating a sports betting operation out of the Circle Club on Castor Avenue in the Northeast, according to CSN-2. Necessarily, Mangini was shown to have had had simultaneous and continuous conflicting interests, that of gambler, collector of gambling debts and Union business agent.

4. *The Mail Fraud Scheme Was Continuing*

There can be no reasonable argument that the mail fraud scheme was completed as of September 23, 1985. Defendants argue that since the Centennial Insurance Company was targeted for the mail fraud, the crime was completed. Defendants ignore the fact that the insurance company's adjusters and the police were investigating the report of the stolen car and that the Union through Traitz, Jr. was then engaged in a flurry of activity to cause the scheme to succeed. That activity included all business agents who were told to deny to the police and the insurance company the truth, known to them, that the car in question had not been stolen but had been taken out and burned by Medina. Where the Affidavit establishes activity of a protracted, continuous nature and a continuous course of conduct, the passage of time between events becomes less significant. *United States v. Nilsen*, 482 F. Supp. 1335, 1338-40 (D.N.J. 1980); *United States v. Hillard*, 542 F. Supp. 487 (S.D.N.Y. 1982). *See United States v. Hershenow*, 680 F.2d 847, 853-54 (lst Cir. 1982).

Here, the investigation focused on the infiltration of a legitimate labor organization by persons associated with organized crime and the operation of the labor organization through a pattern of racketeering activity. A "pattern of racketeering activity" requires at least two acts of racketeering activity occurring within specified time limits. *See* 18 U.S.C. § 1961(5).

> The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added).
>
> . . . "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e).

Sedima, S.P.R.L. v. Imrex, Co., 105 S.Ct. 3275, 3285 n. 14 (1985). The focus of any RICO investigation must be on whether the racketeering acts are isolated in sporadic instances or in furtherance of a common purpose done in the conduct of the affairs of an enterprise. *See United States v. Ianniello*, 808 F.2d 184, 191-192 (2d Cir. 1986); *United States v. Teitler*, 802 F.2d 606, 611-13 (2d Cir. 1986); *United States v. Grayson*, 795 F.2d 278, 288-90 (3d Cir. 1986).

In this investigation, the information contained in the Affidavit supported the finding that there was probable

cause to believe that Stephen Traitz, Jr. and others were conducting the affairs of the Roofers' Union through a pattern of racketeering activity including interstate transportation of stolen property, mail fraud, gambling and extortionate collections of credit. The information showed continuous criminal activity of this nature occurring at the Roofers' Union offices for approximately six months prior to the request for electronic surveillance and showed it would probably continue for at least thirty (30) days into the future.

E. *The Failure of the Government to Disclose That the Garlock Conveyor Was Recovered and the Pleasant Valley High School Material Was Sold Does Not Affect the Facial Sufficiency of the Application*

Defendants contend that the Government knew and intentionally failed to inform the court at the time of the Application that the Garlock conveyor had been recovered and that the material stolen from the Pleasant Valley High School had been sold. Accordingly, defendants assert that there was a material misrepresentation of fact to the court, and had the court been told that these crimes had been "solved", the order would not have issued.

In *Franks v. Delaware*, 438 U.S. 154, 155 (1978), the Supreme Court held that under certain circumstances, a defendant is entitled to a hearing to challenge the factual assertions in a search warrant affidavit.

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to

> cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false, and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any governmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

Id. at 171-172. Even assuming arguendo that defendants' contentions are correct and the allegations concerning the theft offenses are redacted from the Affidavit, a hearing would not be necessary because the information remaining establishes probable cause to intercept. Accordingly, defendants are not entitled to a hearing or other relief.

The first alleged falsity in the Affidavit is the statement that the theft of the Garlock conveyor was stolen by Mark Nuzzi on March 21, 1985. According to defendants, the local police report concerning the theft concludes that the theft occurred either on March 20 or 21, 1985, and, suggests that Mark Nuzzi was not involved. First, it makes no difference to probable cause or lessens the credibility of CSN-1 that he recalled the exact date of the theft whereas the police report is uncertain. Moreover,

any mistake as to date was immaterial. Second, there is nothing in the police report showing that Mark Nuzzi was not involved in the theft on May 21, 1985. The police report merely notes that the theft occurred and remained unsolved. The indisputable point is that the FBI observed Mark Nuzzi as a probable party to the interstate transport of the stolen equipment on April 15, 1985, the same day that CSN-1 told the FBI that the Nuzzi brothers and Michael Campana had been responsible for the theft of the conveyor. The local police report states that the conveyor theft was being investigated federally as of April 2, 1985. The Affidavit does not state when or how the FBI *first* learned of the theft nor is it material to the probable cause determination. The Affidavit states when CSN-1 told Special Agent Grace of the theft. However, the corroboration of CSN-1's account by the FBI's independent observations was important in assessing the informant's reliability.

Defendants allege that the Affidavit falsely states that the conveyor was stolen from a non-union roofer. This alleged falsity is claimed to be critical as it links the thefts to union personnel and the union offices. In fact, further investigation has shown that the contractor victim of the theft was nonunion, as the informant claimed. NIK Construction, the owner of the conveyor, is a general contracting company which does not employ union workers. *See* Affidavit of Special Agent William R. Grace, Government's Memorandum In Opposition to Defendant's Motions to Suppress. It uses its own employees to do roofing work. They are not affiliated with Roofer's Union Local 30/30B. On several occasions, Roofer's Union business agents have attempted unsuccessfully to

organize NIK Construction. These individuals include James Nuzzi, Daniel Cannon, Gary McBride, Joseph Kinkade, and Stephen Traitz, III. In 1974, the principal owner of NIK Construction was beaten severely by Roofer's Union members in retaliation for his refusal to hire Local 30/30B roofers. On one occasion, the owner hired a Union roofing contractor on a particular job site to avoid further problems with the Union. The owner hired the Union contractor after being pressured to do so by officials of the Roofer's Union. Despite acceding to these demands, NIK Construction's equipment has continued to be vandalized and stolen. *See* Grace Affidavit. If known to the court at the time of the Application, this information would have further supported reliance upon CSN-1's statements.

Although the FBI observed Mark Nuzzi riding in a truck on the passenger side and accompanying the stolen conveyor across state lines, without testimony from CSN-1 connecting him to the theft, there was no proof beyond a reasonable doubt that he had stolen it. CSN-1 had told the FBI that he was unwilling to testify in any judicial proceeding because of great fear for his personal safety and that of his family.

Likewise, there was no direct evidence that Campana, the driver of the black truck, stole the conveyor. He may have been in possession of stolen goods, but further investigation would have been necessary to attempt to discover who actually stole it and how they disposed of it. The crime was not solved.

Indeed, the course of criminal activity was not completed because according to CSN-1 the purpose of the

theft was to harass the non-union contractor to sign a contract with Roofers Local 30. There was probable cause to believe, therefore, that this particular contractor, who remained non-union, would continue to be a subject of that kind of criminal activity as would other non-union contractors. This was evidenced by the fact that Campana and Mark Nuzzi, allegedly acting for James Nuzzi and Stephen Traitz, Jr., were known by CSN-1 to steal roofing material from the job site of another non-union contractor. The New Jersey incident, then, cannot be viewed as an isolated incident but rather must be seen as part of a continuous pattern of activity by the same actors for the same illegal purpose.

The final alleged falsity concerns the length of FBI surveillance of the conveyor when it was transported to ACC Roofing in Bensalem, Pennsylvania. Paragraph 13 of the electronic surveillance Affidavit describes, in part, FBI surveillance of the conveyor being transported from New Jersey to Pennsylvania by Mark Nuzzi and of his travelling back to New Jersey. The Affidavit then states, "the surveillance was then discontinued." According to defendants, the statement that surveillance was discontinued is false because the conveyor was photographed at ACC Roofing by the FBI at some later time. Additionally, defendants claim that the conveyor was under continuous surveillance by the FBI while it was parked at ACC Roofing. Paragraph 13 of the Affidavit states no more than that the surveillance of Mark Nuzzi's movements was discontinued at 3:02 p.m. on April 15 when he left Mark Campana's house. Whether or not additional surveillance was conducted at other times simply is not

relevant to the probable cause determination and does not render false the electronic surveillance Affidavit.

Defendants claim that the Affidavit is silent on the fact that the Garlock conveyor was recovered by police authorities in New Jersey on May 6, 1985. Defendants further contend that this omission is crucial because it shows the solution of the crime for which interception was sought. The Affidavit alleged that stolen equipment and materials of non-union contractors were being sold by business agents from the Union offices in order to harass such contractors to sign labor contracts with the Union. The theft offenses are significant in that they tended to establish as reliable the informant's claim that they were connected as part of the pattern of racketeering activity allegedly directed by Union officials.

The finding of the conveyor in New Jersey by the FBI is not material. It would have heightened the need for investigation into the methodology and purpose of transporting the stolen equipment back across state lines. Such transport would have still been consistent with the harassment objective related by CSN-1.

Similarly, the omission from the Affidavit of surveillance of the movement of the stolen rubber and its sale is of no significance. The transportation of the rubber from New Jersey to Pennsylvania merely would have been evidence of an additional violation of 18 U.S.C. § 2314.

Omission of the sale to a Donald Offner was not material because Offner's identity at the time was unknown. *See* Grace Affidavit. Had Offner's identity and affiliation with a union roofing company been known, the conclusions in the Affidavit of thefts of equipment and

materials from non-union roofers and sales to union roofers would have been supported further.

Finally, the stolen rubber incident supported the contention that the Roofers' Union was being operated through a pattern of racketeering activity.

Defendants contend that Special Agent Tamm did not interview the proposed buyer of the conveyor and the buyer of the rubber. According to defendants' theory, interviews of the buyers would have shown that the government's belief that the stolen equipment and materials were being sold from the Union offices was incorrect. This contention is nonsensical. If the buyers knew that the goods were stolen from non-union contractors and sold to them as union contractors, a conspiratorial labor organizational connection would have been obvious. By the same token, assuming that the buyers did not know the goods were stolen and purchased them in good faith, they could hardly attest that the source of the materials was legitimate. The buyer's knowledge would not have reduced the need for investigation but would have increased it.

Clearly, the FBI believed that the proposed buyers knowingly were committing criminal acts by purchasing stolen goods and were allied with officials of the Roofers' Union. Accordingly, there was little hope of obtaining true and correct statements from the buyers and every chance of compromising the investigation. From an investigative standpoint, it was foolish to attempt to interview these individuals in view of the likelihood that the FBI's interest in the Roofers' Union officials would have been

transmitted to the officials. Defendants' claims of omission and inadequacy of investigation in this regard are unfounded.

For the reasons stated, defendants are not entitled to a hearing pursuant to *Franks v. Delaware*, 438 U.S. at 154.

II. *THE SEPTEMBER 23, 1985, ORDER, AND EACH CONTINUATION ORDER, DESCRIBES THE COMMUNICATIONS TO BE INTERCEPTED WITH SUFFICIENT PARTICULARITY*

Section 2518(4)(c) of Title 18 directs that each order authorizing or approving the interception of any wire or oral communication shall specify "a particular description of the type of communication sought to be intercepted, and the statement of the particular offense to which it relates." The statute also requires that the application set forth "a particular description of the type of communications sought to be intercepted." 18 U.S.C. § 2518(1)(b)(iii).

The particularity requirement is necessary to give direction to the monitoring agents as to what conversations can be intercepted and to avoid the issuance of a general warrant in violation of the fourth amendment. To satisfy the requirements of Title III, the orders and applications must identify the specific crimes and the nature and type of anticipated conversations. *See United States v. Licavoli*, 604 F.2d 613, 620 (9th Cir. 1979), *cert. denied*, 446 U.S. 934 (1980); *United States v. Tortorello*, 480 F.2d 764, 780 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

The September 23, 1985, Application/Affidavit sets forth with sufficient detail the type of communications

sought to be intercepted. Paragraph 4(b) of the Application reads:

> In particular these oral conversations will concern the identities of the victims of the alleged extortionate credit transactions, racketeering activity and prohibited gambling enterprises, the amounts extorted, terms of the extortion, the amounts used in the gambling enterprises and the manner in which the proceeds from these illegal activities are distributed, the identities of unknown individuals who are involved in the above described illegal activities with Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi and Robert Medina. Additionally, Stephen Traitz, Jr., and Robert Medina have devised a scheme to defraud, by obtaining money from the Centennial Insurance Company by the use of mail delivered by the U. S. Postal Service. By the interception of oral communications between Stephen Traitz, Jr., Robert Medina and others yet unknown, evidence can be obtained about the nature of the scheme and the extent to which it has progressed.

Later in the Application, authority is requested to intercept communications "in regard to the offenses specified, particularly about the origins, nature, extent, scope, membership, purpose, methodology and operations of the described enterprise. . . ." (Application, ¶ (b), p. 7). The same descriptions of the conversations to be intercepted are repeated in the September 23, 1985, order. *See* Order, ¶ (b), p. 2; ¶ (a), p. 4; ¶ (b), pp. 4-5.

The Order meets the particularity requirements of 18 U.S.C. § 2518(1)(b)(iv) by finding that probable cause in accordance with the Application to believe that the named interceptees were engaged in the conduct of the affairs of an enterprise that engages in, or the activities

which affect, interstate commerce through a pattern of racketeering activity and conspiracy. That pattern consists of at least the acts of interstate transportation of stolen property, collections of credit by extortionate means, and business enterprises of gambling. *See* Order, ¶ (b), p. 2; ¶ (a), p. 4; ¶¶ (b), pp. 4-5. Further, the Order states that probable cause is based upon the Application. The particularity requirements of the Application are further met by the specific incorporation of the Affidavit into the Application. The Affidavit details facts and circumstances giving rise to probable cause and the conclusion that the proposed interceptees were, and continued to be, involved in racketeering activity through Union auspices. The racketeering activity consisted of acts of business enterprise of gambling; collection of unlawful debt by extortionate means; interstate transportation of stolen property for the purpose of harassing and coercing non-union contractors into signing Local 30/30B labor agreements; and mail fraud to protect and promote a means by which the criminal enterprise collected unlawful debt, in violation of the criminal statutes enumerated in the Application/affidavit.

In proper circumstances, the instrumentalites of Title III may be employed to discover the full extent of crimes and conspiracies and a broad scope of authorization is permissible. *United States v. Vento,* 533 F.2d 838, 850-852 nn. 21-29, 862 n. 74 (3d Cir. 1976).

Each of the continuation orders and applications gives specific directions to the monitoring agents concerning the nature of the communications to be intercepted. In view of the wide variety of offenses under investigation, the broad scope of the illegal enterprise

and number of participants, the description of communications to be intercepted could not have been more detailed.

The requirements of Title III are satisfied, and the interception orders are not general warrants, defendants' arguments notwithstanding. "Where, as here, a continuing course of criminal conduct is involved, a wiretap order must necessarily be framed flexibly enough to permit interception of any statements concerning a specified pattern of crime." *United States v. Steinberg*, 525 F.2d 1126, 1131, (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), (quoting *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973)). Although the Orders may use some general terms, they are sufficiently precise as to interceptees and activities to direct attention to the facts and averments of the Application/Affidavit. Internally, they specify that the focus is on business enterprises of gambling, collections of credit by extortionate means, mail fraud, interstate transportation of stolen property, or embezzlement of pension and welfare funds, or bribery or solicitation of a trust fund administrator as part of a continuing pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) and (d) and the enumerated substantive offenses. Here, there is alleged a continuous course of activity whereby the named interceptees are subverting legitimate labor organization objectives and purposes through illegal activities of conducting gambling businesses, collections of unlawful debt by extortionate means and interstate transportation of stolen goods, all through conduct and control of the Union.

Although the nature and type of anticipated conversations must be described, it is impossible for an application, or order, to describe with detail what has not yet occurred. *United States. v. Tortorello,* 480 F.2d at 780. Consequently, "[i]n determining whether the order and application are sufficiently particular, the papers as a whole must be considered especially those portions which recite facts intended to establish probable cause." Id. Applications for electronic surveillance are to be read in a commonsense and realistic fashion and, if there is under the totality of circumstance, a fair probability that evidence of the crimes alleged will be found, authorization should be granted. *U.S. v. Errera,* 616 F. Supp. 1145 (D.C. Md. 1985).

Considering the totality of the Orders, Applications and Affidavits, in this case, I find that the particularity requirements of the fourth amendment and Title III have been met in all respects. *See United States v. Escandar,* 319 F. Supp. 295, 302-04 (S.D. Fla. 1970).

III. THE APPLICATIONS/AFFIDAVITS CONTAIN SUFFICIENT INFORMATION TO SUPPORT THE FINDINGS THAT NORMAL INVESTIGATIVE TECHNIQUES HAD BEEN TRIED AND FAILED, REASONABLY APPEARED TO BE UNLIKELY TO SUCCEED IF TRIED OR WERE TOO DANGEROUS

Defendants contend that the Tamm Affidavits contained insufficient information to provide a basis for the finding that "normal investigative procedures . . . [had] been tried and . . . [had] failed or reasonably appear[ed]

to be unlikely to succeed if tried or . . . [are] too dangerous." 18 U.S.C. §§ 2518(1)(c), 3(c). These contentions are without merit.

> "The statutory burden on the government is not great in showing compliance with § 2518(3)(c) and the government "need not prove to a certainty that normal investigative techniques will not succeed, but rather need only show that such techniques 'reasonably appear to be unlikely to succeed if tried.'" *United States v. Armocida*, 515 F.2d 29, 38 (3d Cir.), *cert. denied*, 423 U.S. 858, 96 S. Ct. 111, 46 L.Ed.2d 84 (1975).
>
> Sections 2518(1)(c) and (3)(c) must be read in a common sense fashion. S.Rep. No. 1097, 90th Cong., 1 2d Sess., 1968 U.S. Code Cong. & Ad. News. 2112, 2190. *See also United States v. Armocida, supra.* They are designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. *United States v. Kahn*, 415 U.S. 143, 153 n.12, 94 S. Ct. 977, 39 L.Ed.2d 225 (1974); *United States v. Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S. Ct. 1568, 43 L.Ed.2d 778 (1975). Their purpose "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States v. Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S. Ct. 1558, 48 L.Ed.2d 774 (1975)."

United States v. Dalia, 426 F. Supp. 862, 864 (D.N.J. 1977), *aff'd*, 575 F.2d 1344 (3d Cir.), *aff'd*, 441 U.S. 238 (1978). *See United States v. Lambert*, 771 F.2d 83, 90-91 (6th Cir.), *cert. denied*, 106 S. Ct. 598 (1985); *United States v. O'Malley*, 764 F.2d 38, 43-44 (1st Cir. 1985); *United States v. Adams*, 759 F.2d 1099, 1114-15 (3d Cir.), *cert. denied*, 106 S. Ct. 336 (1985); *United States v. Alonso*, 740 F.2d 862, 867-69 (11th

Cir. 1984), *cert. denied*, 469 U.S. 1166 (1985); *United States v. Webster*, 734 F.2d 1048, 1054-55 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *United States v. Terry*, 702 F.2d 299, 310-11 (2d Cir.), *cert. denied*, 464 U.S. 992 (1983); *United States v. Robinson*, 698 F.2d 448, 452-53 (D.C. Cir. 1983); *United States v. Williams*, 580 F.2d 578, 587-90 (D.C. Cir.), *cert. denied*, 439 U.S. 832 (1978); *United States v. DiMuro*, 540 F.2d 503, 510-11 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Vento*, 533 F.2d at 849-50. The government need not exhaust all investigative techniques prior to requesting Title III interception authority, but cannot seek to intercept communications as an initial step without any basis to believe that traditional investigative methods will be unsuccessful. *See United States v. Adams*, 759 F.2d at 1114-15; *United States v. Vento*, 533 F.2d at 849-50.

The facts underlying the Court's finding in this matter are found in Special Agent Tamm's Affidavit in support of the September 23, 1985, Interception Order. (Affidavit, ¶¶ 30a, 32-39). Tamm had been involved in investigations of the Roofers' Union and persons associated with the Union since May, 1976. Therefore, Special Agent Tamm possessed a wealth of information concerning the personnel and enterprise under investigation. The close circle of criminal associates under investigation and the methods by which they insulated themselves from criminal exposure showed that it was unlikely that an undercover agent could be introduced to the organization and hope to infiltrate it. (Affidavit ¶¶ 33, 35); *United States v. Webster*, 734 F.2d at 1054-55; *United States v. Vento*,

533 F.2d at 849-50. The Affidavit states that the confidential informants, one of whom had had a personal association with the targets for over ten years, had been unable to penetrate the criminal enterprise totally. (Affidavit, ¶ 35). Similarly, FBI interviews with victims or potential witnesses regarding the matters under investigation would likely compromise the investigation because the subjects would become aware and place great pressure on such persons not to cooperate. (Affidavit, ¶ 35). Special Agent Tamm's experience and the information provided by the confidential informants demonstrated that the conventional method of gaining cooperation from ordinary witnesses or insiders would be unsuccessful. Specifically, according to CSN-2, Stephen Traitz, Jr. and Roofers' Union business agents stated that they would not cooperate with law enforcement authorities investigating the false insurance claim for Robert Medina's leased automobile. (Affidavit, ¶ 30A). Likewise, according to CSN-2, Stephen Traitz, Jr. was already engaged in an internal investigation of a suspected inside "leak" of information to law authorities. (Affidavit, ¶ 17). The same experience with lack of cooperation was shared by state and federal law enforcement authorities in New Jersey and Pennsylvania. (See Affidavit, ¶ 36). Additionally, the targets' conduct in insulating themselves made impossible investigation and prosecution using traditional witness sources. (Affidavit, ¶ 35).

The confidential informants refused to testify due to fear for themselves and their families. (Affidavit, ¶ 34). Accordingly, the informants only could serve as a source of leads and intelligence information rather than as witnesses for trial. Furthermore, as stated in the Affidavit,

physical surveillance could only confirm that the targets were meeting but could not reveal the extent of the knowledge or participation in the criminal activities. Tamm concluded reasonably that members of Local 30 were probable victims of loansharking activity, are long time members of the Union and that trying to introduce a stranger into the gambling and loansharking process would likely fail and compromise the entire investigation. (Affidavit, ¶ 33).

Search warrants were likely to be unsuccessful because gambling and loanshark records traditionally are incomplete and in code. Furthermore, no records concerning the other suspected criminal activity were likely to exist. (Affidavit, ¶ 37). The court had before it an affiant of considerable experience with this particular Local Union and sufficiently specific information to conclude that traditional investigative techniques had not been successful and were not likely to succeed in the future. Accordingly, the bases for the court's finding under 18 U.S.C. § 2518(3)(c) were detailed and adequate under the circumstances.

Likewise, the requisite information was provided in each of the succeeding Tamm Affidavits for the finding by the court that normal investigative procedures were unreasonable under the circumstances and for the authorization of oral interceptions. The language of the Tamm Affidavits satisfied 18 U.S.C. § 2518(1)(c) and supported the court's findings under 18 U.S.C. § 2518(3)(c). Moreover, the initial finding of the need for the oral interception as the only viable investigative tool never changed. Indeed, the obviousness of that finding was demonstrated by the interceptions during the first period, which

were brought to the court's attention through the weekly progress reports as well as the Applications/Affidavits. The need for continuation of the surveillance as an investigative technique, as determined by the court through all that was presented for its consideration, is reflected in the fact that the authorizations issued.

No argument has been advanced by defendants that there was any reasonable alternative to the oral communication surveillance to discover the full scope and depth of the criminal activities enumerated in the Order.

IV. THE ORDERS' MINIMIZATION LANGUAGE, DIRECTIVES AND PROCEDURES ARE SUFFICIENT

Defendants claim that the minimization language incorporated by reference into the interception orders from the Affidavits was misleading, confusing and insufficient to give the monitoring agents any meaningful direction.

Title III mandates that electronic surveillance orders contain a provision stating that the surveillance will be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). This provision, as well as the requirement that the monitoring agents minimize interception, was included in Title III to protect the privacy rights of the persons subject to interception. Mere omission of the minimization language from the interception order does not require suppression. *See United States v. Vento*, 533 F.2d at 857-61; *United States v. Cirillo*, 499 F.2d 872, 879 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States v.*

Baynes, 400 F. Supp. 285, 300-10 (E.D. Pa.), *aff'd mem.*, 517 F.2d 1399 (3d Cir. 1975). Instead, such omission is viewed as merely a technical defect in the interception order. *Baynes*, 400 F. Supp. at 309-10. Rather than rely on the strict language of the interception order, courts rely on the actual conduct of the monitoring agents to minimize non-pertinent conversations. *Id.* The extent of minimization required can only be determined during the course of the interception. *United States v. Scott*, 516 F.2d 751, 754 (D.C. Cir. 1975).

The required minimization language was included in the interception order of September 23, 1985, and each subsequent order. The Affidavit contained detailed minimization instructions. Minimization conferences were held, memoranda containing minimization instructions were distributed between Special Agent Tamm and the intercepting agents, and appropriate minimization of non-pertinent conversations occurred. Accordingly, defendants are not entitled to the relief sought.

Each interception order stated that "the interception process shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119, Title 18, United States Code, pursuant to procedures described in the Affidavit of Special Agent (SA) Quinn John Tamm, Jr." Each Affidavit of Special Agent Tamm set forth detailed minimization instructions which directed procedures to assure that non-pertinent conversations would not be recorded. (Affidavit ¶¶ 40-42). In this regard, Special Agent Tamm stated that fixed surveillance would be conducted to determine whether any of the named interceptees were present at the Roofers' Union offices. He was to direct

that interception would be suspended if no named interceptee, or confederate when identified, was present unless it already was determined that the conversation could involve criminal offenses enumerated in the Affidavit. Regardless of who was present, he was to direct that interception would cease if the conversation was not criminal in nature, and that all efforts be made to minimize personal, privileged and non-criminal conversations.

The Order, Application and Affidavit meets the legislative concerns encapsuled in 18 U.S.C. § 2518(5), and this court finds the September 23, 1985, and the subsequent orders, sufficient on their face in this regard.

According to a further Affidavit of Special Agent Tamm, he carried out these directions in the company of Richard Scheff, AUSA, by giving careful instructions to the monitoring agents. Specifically, a conference was held with the monitoring agents to explain the nature of the investigation, the crimes for which interception was authorized, the names of interceptees, procedures for spot checking and the emphasis on proper minimization. Agents were advised to minimize interception of personal, privileged and non-criminal conversations. Each agent was directed to read the interception orders, applications and affidavits and to read a memorandum restating the minimization principles explained at the conference and in the electronic surveillance documents. (*See* Affidavit, Special Agent Quinn John Tamm, Jr., Government's Memorandum in Support of Answers to Defendants' Motions to Suppress Electronic Surveillance).

The interception was conducted in accordance with the minimization instructions as is evident from the daily logs created contemporaneously with the recording of conversations as well as from the recorded conversations themselves. Some irrelevant conversations are inevitably intercepted and some circumstances reasonably require monitoring of all conversations for a period of time or until it is clear that certain conversations fall into categories not reasonably expected to be related to the criminal investigation. *United States v. Scott*, 516 F.2d at 754. In this case, in view of the anticipated expanse of the criminal conduct within the scope of the Orders, the provisions for minimization satisfy the requirements of 18 U.S.C. § 2815(5).

V. *THE APPLICATIONS WERE MADE, UNDER OATH*

The September 23, 1985, Order, and the subsequent continuation Orders, all recite that the Applications were made under oath before the issuing court by Richard L. Scheff, the Assistant United States Attorney for the Eastern District of Pennsylvania. The face of the orders themselves attest to the fact that the "Application was made under oath or affirmation to a judge of competent jurisdiction" in satisfaction of 18 U.S.C. § 2518(1).

Although the signature lines of the Applications do not manifest that they were signed under oath before the court, each Application demonstrates in the first lines that the applicant was, in fact, sworn and made the representations therein to the court under oath. Further, the Affidavits of Special Agent Tamm, which contain the

allegations of fact as to suspected criminal activity, are shown to have been given under oath at the time of the Applications by the presence of the seal of the court by the signature of the judge. The sworn Affidavits are incorporated by reference in the Applications in their entirety. (*See*, ¶ 4). Further, Special Agent Tamm states in an additional Affidavit that in each instance, Mr. Scheff was placed under oath by the court prior to his signing each application for electronic surveillance. Tamm Affidavit, Exhibit B, Government's Memorandum In Support of Answers to Defendants' Motion to Suppress Electronic Surveillance. Under all these circumstances, it is apparent that the statutory and fourth amendment requirements of "oath or affirmation" were met. *United States v. Talbert*, 706 F.2d 464, 467 (4th Cir. 1983). *See United States v. Landmesser*, 553 F.2d 17 (6th Cir.), *cert. denied*, 434 U.S. 855 (1977).

VI. *THE TITLE III ORDERS, APPLICATIONS, AFFIDAVITS AND PROGRESS REPORTS WERE FILED UNDER SEAL AND IN FACT WERE SEALED*

The Title III documents have been maintained in the district court clerk's office in a special sealed vault, except when reviewed by the district judge pursuant to a request by defendants for disclosure, by the Third Circuit reviewing a denial of that request and finally when produced in court for review by the defense counsel at hearings in April, 1987 and May, 1987. There is no claim in this case that any of the documents have been disclosed to any unauthorized person or that any defendant or person has suffered any prejudice by any alleged

"unsealing." Nor is there any evidence that the confidentiality sought to be established by this court's sealing orders was breached at any stage.

However, defendants contend that the condition in which the sealed documents, excepting the recordings, were found when removed from the vault affords a basis for declaration of the surveillance Orders as invalid as violative of the sealing requirement of 18 U.S.C. § 2518(8)(b). Their arguments do not directly concern tapes themselves which were sealed in accordance with the requirements of § 2518(8)(a). Defendants make no argument that the court failed to order the documents sealed. In fact, the court so ordered.

According to our clerk's office, in April, 1987, the entire file in this matter was produced in the condition in which it was returned to the district court by the court of appeals. Many of the cellophane tape seals on filing envelopes were jaggedly broken and left unsealed and some documents were outside their envelopes. The deputy clerk in charge of the vault did not reseal the envelopes or place the loose documents in envelopes because he was unsure which documents went into particular envelopes. The issuing judge was not informed of the condition of the file. Nevertheless, the entire file remained sealed in the clerk's vault which is dedicated to Title III files under seal and to which only a few authorized persons in the clerk's office have access to carry out directions of the district court or the court of appeals regarding the files. The confidentiality interest evidenced by 18 U.S.C. § 2518(8)(6) was maintained.

The fact that the envelopes were not sealed when returned from the court of appeals or that documents remained loose in the file of the case within the vault does not so offend the statutory purpose of confidentiality as to warrant suppression of the evidence seized. Technical infractions of the sealing statutes do not render the court's orders invalid. *United States v. Cantor*, 470 F.2d 890, 893 (3d Cir. 1972); *United States v. Howell*, 581 F. Supp. 65, 69 (D.C. Neb. 1983).

Defendants' contentions in this regard are without merit.

VII. *THE OCTOBER 24, 1985, ORDER*

A. *Facial Sufficiency of the October 24, 1985, Order*

Defendants move to suppress the contents of the intercepted oral communication pursuant to 18 U.S.C. § 2518(10)(a)-(ii), which permits such suppression when "the order of authorization or approval under which it was intercepted is insufficient on its face." The basis for defendants' motion is that page three of the October 24, 1985 Order is missing.

Before a Title III order may be entered, § 2518(3) requires the judge to make a series of determinations based on the Government's application:

> Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the application that . . . .

18 U.S.C. § 2518(3). Defendants contend that, absent page three, the October 24, 1985, order violated 28 U.S.C. § 2518(3) which requires a judicial finding that

> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

28 U.S.C. § 2518(3)(c), (d). In addition, defendants argue that the order fails to comply with 28 U.S.C. § 2518(4)(d), which states that "[e]ach order authorizing or approving the interception of any wire or oral communication under this chapter shall specify . . . the identity of the agency authorized to intercept the communications, and of the person authorizing the application."

On April 21, 1987, counsel and the court reviewed the original documents in this matter, filed under seal, which provided for the interception of oral communications. Page three was missing from the original document, and it is also missing from the copies of all defense counsel and of the Government. This court must assume for the purpose of ruling on the motion that the page was missing when the order was signed. Addressing first the contention that the lack of a written finding renders the October 24, 1985, Order facially insufficient, I find that the absence of a written recitation of the statutorily required conclusion does not mandate suppression.

18 U.S.C. § 2518(c) does not require that the judicial determinations mandated by the statute be set out in

writing or that the determination be expressed in words rather than by the act of the judge. *See, e.g., United States v. Martinez,* 588 F.2d 1227, 1233 (9th Cir. 1978) (judge not required to issue findings of fact to support wiretap order); *United States v. Tortorello,* 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972) (section 2518(3)(c) does not require that particular words be used in the finding or that the finding be expressed in words rather than by the act of the judge), *aff'd,* 480 F.2d 764 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); *United States v. Mainello,* 345 F. Supp. 863, 874 (E.D.N.Y. 1972) (no specific statement of facts required in order and when the investigation involves a large scale conspiracy the difficulty of procuring reliable evidence through conventional investigative channels is self-evident); *United States v. Escandar,* 319 F. Supp. 295, 304 (S.D. Fla. 1970) (section 2518(3) does not mandate that judge's determination be reflected in the written order), *remanded sub nom., United States v. Robinson,* 472 F.2d 973 (5th Cir. 1973) (per curiam); J. Carr, The Law of Electronic Surveillance (2d ed. 1986). Further, Senate Report 1097 also does not indicate that written findings are required. S. Rep. No. 1097, 90th Cong., 2d Sess. 11 *reprinted in* 1968 U.S. Code Cong. & Admin. News 2153.

Thus, under the broadest view of 18 U.S.C. § 2518(3), the signature of the issuing judge on the order evidences that he or she has made the statutorily required determinations. Several considerations support that conclusion.

The judge's signature indicates that he or she has considered the application and the supporting affidavits for an interception order. Further, the October 24, 1985,

Order states that the court has given "full consideration . . . to the matter set forth" in the application. Order of October 24, 1985, at 1. That Order also states that the application was made to the court under oath by the Assistant United States Attorney.

When the statute does not require a written finding, it is reasonable to infer from the act of the judge that he or she has made, at least, the minimal determinations required by 18 U.S.C. § 2518(3). That inference is supported by the cases that hold that a minimal written finding by the issuing judge, even one that only parrots the conclusory language of the statute, satisfies § 2518(3). *See, e.g., Martinez,* 588 F.2d at 1233; *Tortorello,* 342 F. Supp. at 1036; *Mainello,* 345 F. Supp. at 874; *Escandar,* 319 F. Supp. at 304.

There is no practical difference between the minimal findings that have been found to comply with the statute and an absence of written findings. When the issuing judge makes written findings that set forth the statutorily required conclusion without reasons or reference to the application and affidavits, the court on review must examine the application and supporting materials to determine whether the decision of the issuing judge was proper. *See, e.g., Martinez,* 588 F.2d at 1233. In *Martinez,* the issuing judge addressed 18 U.S.C. § 2518(3)(c) by merely concluding and repeating the statutory language. By finding that the conclusory order was based on full consideration of the information contained in the application and the supporting affidavit, the *Martinez* court held that written findings of fact in support of the order were unnecessary and that the "factual grounds upon which

the judge issued the order can be inferred from the affidavit, and to require extra findings would not add to our ability to properly review his actions." *Id.*

Thus, a court reviewing the issuance of a Title III wiretap order must refer to the application regardless of whether there were written findings. Page one of the October 24, 1985, Order states that "[a]pplication under oath having been made before me by Richard L. Scheff, Assistant United States Attorney . . and full consideration having been given to the matter set forth therein . . . ." When the issuing judge has made no written determination, the signature of the judge on the order reflects the judge's consideration of the application and affidavit and embodies his or her conclusion that the application satisfies 18 U.S.C. § 2518(3).

Further, the October 24, 1985, Order states that the application was made under oath by the Assistant United States Attorney before the issuing judge. Thus, the order incorporates the application and necessarily incorporates the affidavit of Special Agent Quinn John Tamm. That incorporation supports the proposition that, even absent a written finding, the reviewing court must consider the application and affidavit when examining the order for compliance with 18 U.S.C. § 2518(3).

The structure of the statute also leads to that conclusion. Section 2518 sets out a detailed, mandatory procedure governing the interception of wire or oral communications. Within the scheme of the statute, § 2518(1) is the primary restraint imposed by Congress to avoid undue intrusions upon privacy. Section 2518(1) sets

a standard for the Government's written showing that the facts of the situation overcome the right to privacy.

In comparison, 18 U.S.C. § 2518(3) commits to the discretion of the judge the authorization to issue the ex parte order, but the use of a judge as the decisionmaker is the sole protection of the right of privacy in § 2518(3). As discussed, *supra* at 52-54, the issuing judge must determine that probable cause exists for factors set out in §§ 2518(3)(a)-(d), but the judge need not make those findings in writing. Further, each of those findings only reflect an evaluation of a requirement of the application set out in § 2518(1).

Thus, 18 U.S.C. § 2518(3) obligates the courts to balance the permissible use of electronic investigative devices against the mandatory Congressional restraints set out in the remaining subsections of § 2518: (1) (written requirements for the application); (4) (restrictions on the communications to be intercepted); (5) (restrictions on length of interception period and minimization of communications intercepted; (6) (progress reports justifying continued interception); (7) (provision for emergency interception without prior application); (8) (provisions regarding method of recording interceptions and sealing and preservatiion of applications, order and recordings made, under § 2518); (9) (restrictions or use of interceptions as evidence in court proceedings prior to disclosure of order and application to parties to those proceedings); and (10) (procedure for suppression of intercepted communications). *Cf. United States v. Vento*, 533 F.2d at 849 (statement of purpose of Title III). 18 U.S.C. §§ 2511-2517 sets out further general restrictions on interceptions of wire or oral communications.

For the purpose of review of orders authorizing interception, the structure of the Act places the primary protection of the right to privacy on the 18 U.S.C. § 2518(1) application. While the issuing judge is certainly the safeguard against any abuse of the rights of the public, the nature of an ex parte order guarantees that the ultimate judicial decision on the privacy issue must occur after interception. When that review relies on the requirements for the application set out in § 2518(1), *see, e.g., Martinez*, 588 F.2d at 1233, it is reasonable to find that an order that was entered after consideration of an application and affidavit that conform to the provisions of § 2518(1) meets the requirements of § 2518(3) without a written finding. Defendant's assertions that the lack of a written finding renders the October 24, 1985, Order facially insufficient are without merit.

Further, the purpose of 18 U.S.C. § 2518(3)(c) is to ensure that the "necessity requirement" of § 2518(1)(c) is met. *Martinez*, 588 F.2d at 1231. Wiretaps are not to be used routinely or as the first step of an investigation when other, less intrusive investigatory techniques are viable. Necessity exists if the application and affidavit support a finding of probable cause that normal investigative procedures will not suffice. *Id.* at 1232. As discussed *infra* at 76-77, probable cause existed to support the belief that normal investigative procedures reasonably appear to be unlikely to succeed if tried or to be too dangerous. Similarly, defendants' contention that the October 24, 1985, Order violates § 2518(3)(d) fails, for the analysis demonstrates that probable cause existed for the belief that the facilities listed for interception are being

used, or are about to be used, in connection with the listed offenses by the named interceptees.

The October 24, 1985, Order is not facially insufficient and suppression under 18 U.S.C. § 2518(10)(a)(ii) is not required.

B. *The October 24, 1985, Order Satisfies 18 U.S.C. § 2518(4)*

18 U.S.C. § 2518(4)(a)-(e) provides

> (4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify –
>
> (a) the identity of the person, if known, whose communications are to be intercepted;
>
> (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
>
> (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

Defendants contend that, absent page three, the October 24, 1985, Order fails to comply with § 2518(4)(d).

Although not in the same sequence as 18 U.S.C. § 2518(4), the October 24, 1985, Order sets out all the

directives required by the statute. First, the Order identifies the Department of Justice official authorizing the application. Page four of the Order identifies the "Assistant Attorney General, Criminal Division, United States Department of Justice, who has been specifically designated by the Attorney General of the United States to exercise the power conferred upon him by section 2516, Title 18, United States Code. . . ." 18 U.S.C. § 2516 specifies the persons who may authorize interception of wire or oral communications. When read together, the title of the Assistant Attorney General, Criminal Division, and the reference to that official exercising the power conferred upon him by § 2516 necessarily indicates that the Assistant Attorney General In Charge of the Criminal Division authorized the interception application. In fact, the Assistant Attorney General In Charge of the Criminal Division did authorize the application for the October 24, 1985, Order.

It is not significant that the Order mentions the title rather than the name of the authorizing official. *See United States v. Chavez*, 416 U.S. 562, 565, 579-80 (1974) (order incorrectly noted that the Assistant Attorney General approved the application when in fact it was approved by the Attorney General); *United States v. Lambert*, 771 F.2d 83, 90 (5th Cir.), *cert. denied*, 106 S. Ct. 598 (1985); *United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984) (authorizing official can be designated by position rather than specific individual). Certainly, the reference to the name rather than the title of the authorizing official is not "a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures." *United States v. Giordano*, 416 U.S. 505, 527

(1974), *quoted in United States v. Acon*, 513 F.2d 513, 517 (3d Cir. 1975). The purpose of 18 U.S.C. § 2516 is to "centralize [] in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques." S. Rep. No. 1097, 90th Cong., 2d Sess. 96-97, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, *quoted in United States v. Giordano*, 416 U.S. at 520. The reference in the order to the title of the authorizing official fulfills the congressional intent of 18 U.S.C. § 2516 to fix responsibility on the public official who authorized the wiretap.

Second, the Order identifies the agency auhorized to intercept the communications as the Federal Bureau of Investigation. Page six of the Order states that "the Bell Telephone Company of Pennsylvania shall furnish the Federal Bureau of Investigation such information, facilities and technical assistance as are necessary to accomplish the oral interception . . . ." Logic dictates that if the Order directs the Bell Telephone Company to assist the FBI with the interception, then the FBI is the agency authorized to intercept.

Suppression is not required as the October 24, 1985, Order complies with 18 U.S.C. § 2518.

C. *The Probable Cause Finding is Supported by the Application/Affidavit for Continuation of the Interception of Oral Communications in the October 24, 1985, Order*

1. *Extortionate Collection of Extension of Credit*

According to the Application/Affidavit, on September 26, 1985, a roofing contractor, who has been summoned to the Union (Local 30B) because he is short on

making payments of dues money to Local 30B, is physically assaulted in the Business Agent's Meeting Room. He is heard to be slapped by Ernest Williams, one of Local 30B's business agents, who demanded to know why he was delinquent. Robert Medina, a Local 30B business agent, and Ernest Williams are heard to tell the contractor that this time he is lucky to have gotten away with a slap on the head, and that from now on he must report at least 180 hours a month and pay the corresponding dues. Medina tells the contractor that he, Medina, is not going to be a nice guy. The conversation involves a continuing threat of physical violence to collect a dues debt the contractor owed by forcing him to report hours in the future unrelated to actual hours worked.

On October 3, 1985, in the Business Agent's Meeting Room, Robert Crosley and Charles Murtaugh, business agents of Roofers' Local 30, discuss a new policy of Local 30 of requiring owners of small roofing companies, referred to as "principals", to pay to the Union a monthly minimum of 100 hours of dues money even though the principals have not worked. Crosley states that he thinks a named attorney has advised that the practice is legal. Murtaugh expresses his opinion that the way in which it is being conducted amounts to extortion.

On October 4, 1985, in the same place, Robert Medina, Joseph Traitz and Richard Schoenberger, all business agents of Roofers' Local 30, confront another named roofing contractor and inform him of the union policy of requiring principals to report, for delinquent dues purposes, 100 hours a month whether they work 100 hours or not. The business agents cause the contractor to leave the room and then discuss whether he should be slapped

around. They decide against the physical assault approach because he is a retired Philadelphia Police Officer. The contractor returns to the room, inquires about the definition of "principal" and Schoenberger tells him that he should be beaten up for his insolence. The contractor is told to leave and return later.

On October 11, 1985, in the same room, business agents Robert Medina, Richard Schoenberger, Stephen Traitz, III, Joseph Traitz and Michael Mangini hold a conversation with another roofing contractor about dues. The contractor is told that Medina would break his face if he were another guy. Mangini tells the contractor that because he knows him nothing will happen to him this time, but the contractor is advised that he should not want to be called into the Union Hall again over the issue of payment of 100 hours worth of dues a month to Roofers' Local 30.

Title 18, Section 894 prohibits under penalties of law the knowing participation in any way, or conspiracy to do so, in the use of extortionate means 1) to collect or attempt to collect any extension of credit, or 2) to punish any person for the nonpayment. These above summarized interceptions during the first thirty (30) day authorization period demonstrated probable cause to believe that there were 18 U.S.C. § 894, violations occurring. Apparently, the contractors owed dues monies to Local 30B that were payable contemporaneously, under the terms of a labor agreement, for hours worked by members of the Union on the contractors' job sites. The contractors apparently were delinquent in payments for which they may have been personally liable as principals.

Rather than instituting lawful means to collect the indebtedness, the Union, through some business agents of Local 30B, were engaged in a campaign of extending the time for payment of delinquencies of monies due. These dues were to benefit the pension or health and welfare funds of the Union members who had earned eligibility credit for time worked. Collecting that extension of credit by use of physical force and threats of physical force against principals of the delinquent small businesses, and further, by requiring them to falsify reporting records to reflect hours worked by the principals themselves when no work was done by them constituted sufficient basis for authorizing interceptions as to probable § 894 violations.

Defendants argue that the objective of the surveillance was accomplished by the described interceptions and that the continuation order was an abuse of discretion warranting suppression of the evidence. Defendants assert that the Government had sufficient evidence necessary for prosecution of a 18 U.S.C. § 894 violation. These arguments are without merit and are rejected as frivolous.

The extortionate acts to collect monies owed the contractors could not have reasonably been viewed in isolation from the pattern of racketeering claims. Continuation of surveillance was necessary to ascertain the origins and authorizers of the collection policy, if there was such a policy, the victims of the alleged extortionate activity and how the money collected in the names of the principals would be used. Logically, if the false hours were to be reported in the names of the principals, who were contractors and not employees, there was reason to believe that the dues collected could be diverted from a proper

use to the benefit of those who devised and participated in the continuing extortionate scheme. Therefore, there was clear reason to believe that the conversations about this policy would be intercepted in the next thirty (30) days.

2. *Embezzlement from Pension and Welfare Funds*

As mentioned above, the motive for requiring principals to report the hours worked in their own names was indicative of the ability and desire of the "policy makers" and fund controllers to manipulate the monies received and divert them from the funds to personal use. The fund records would have continued to show delinquencies for the hours reported to the fund for hours actually worked by members of Local 30B and similarly, would credit contractors' "time worked" if they were not participants in the employee plans. Monies paid to the Union but obligated to any account are subject to misuse and embezzlement. This alone would have sufficed for continued authorization of the second period of surveillance for possible 18 U.S.C. § 894 violations.

However, it was also reported to the court through the supporting Application/Affidavit that on October 1, 1985, Stephen Traitz, Jr. and Michael Mangini had a conversation wherein they discussed Traitz, Jr. gaining control of the legal services fund of Local 30 so that they "can be getting something back from it." The Union's legal services fund is an employee benefit plan covered under the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461. At that time, October 1, 1985, the plan was being administered by

Attorney Herbert K. Fisher. Traitz, Jr. was heard to say to Mangini in the Business Manager's Office that after the first of the year, January 1986, control of the legal services funds should be transferred to Edward Hurst, a business agent and administrator of the other employee benefit plans at Roofers' Local 30. They then discuss the possibilities that would occur once the legal services fund could hire lawyers independent of Fisher and his law firm. Traitz, Jr. then whispers to Mangini saying that once you get to know the lawyers who are being hired, you can "wack" their fees.

Defendants Herbert Fisher and his law partner, Herman Bloom, argue along with the other defendants that this conversation did not support a reasonable belief that within the thirty days after October 24, 1985, there would likely be intercepted conversations about gaining control of the legal services fund in order to profit from it since at best, the change of attorneys would not take place until January, 1986. This argument is frivolous.

First, the subject was current enough to the interceptees that they were talking about it on October 1, 1985, and planning how to control the controller of the fund in order to gain something from it. So, it was reasonable to expect that the discussions and plans to gain that control would be continuous and evolutionary in effecting a change of fund administrators, and a change of law firms relative to the legal services fund. In those anticipated evolutionary plans, there was reason to believe that within the next thirty day period acts would occur in furtherance of the plan and a conspiracy to divert the

legal funds from their proper objective, including planning with Edward Hurst to give real control of the fund to Stephen Traitz, Jr.

Second, the stated desire of Traitz, Jr. to transfer control of the legal services fund to Edward Hurst, a business agent, in order to insure that through control of the legal services fund, reasonably implied that Traitz, Jr. already controlled the Local 30 employee benefit fund administrator and profited from the other funds administered at Local 30.

Third, the conversation indicated that Traitz, Jr. had "wacked" and was continuing to "wack" the legal fees of Herbert Fisher. Traitz, Jr. stated that "once you get to know the lawyers who are being hired, you can 'wack' their fees." Obviously, he had at some point in the past gotten to know Fisher well enough that he and his firm had been hired as the Union attorneys. The implication of the phrase in the context of this conversation was a kickback of fees to obtain money that would be converted to personal use.

Defendants' reading of this statement as suggesting only that something might occur in January, 1986 is unreasonable. A reasonable reading of the statement is that Traitz, Jr. routinely demanded of lawyers being hired and billed for fees that they agree to have them "wacked" illegally, and, as suggested by the whispering, probably for his benefit. The phrase "are being hired connotes attorneys then being hired, or those under hire or who have been hired. Traitz, Jr. did not use the phrase "will be hired." The phrase "are being hired" certainly includes the present tense.

Further evidence of possible embezzlement and control over the Local 30 administered employee benefit plans for Traitz, Jr.'s personal use was an intercepted conversation of October 2, 1985, wherein Stephen Traitz, Jr. and James Nuzzi advise a New Jersey roofing contractor that he has immunity from the obligations of a subsisting labor agreement because of a "mutual friend." Traitz, Jr. states that because of his grant of immunity, the contractor has saved over "$100,000.00" by not paying dues for his workers or money to the employee benefit plans of Roofers' Local 30. Exempting a contractor for personal benefit from monetary obligations to the pension and welfare fund, which in turn is obligated to the workers, is tantamount to taking the money directly out of the fund's bank account. The diversion of money was continuing. It was reasonable to expect that continued interception would disclose the name of the "friend" who had such influence over the financial interests of Local 30.

All of the above interceptions warranted interception authorization for possible continuing violations of 18 U.S.C. § 894 and as predicate racketeering acts cognizable under 18 U.S.C. §§ 1962(c) and (d) and § 1963.

3. *Mail Fraud as a Predicate Act Under RICO*

The mail fraud scheme as to the Centennial Insurance Company, despite defendant's protests to the contrary was neither sought to be nor ordered to be surveilled as a substantive count but rather as a predicate act in furtherance of the racketeering activity of a criminal enterprise conspiracy. The possible motivation for Traitz, Jr.'s decision to cover up the drunken driving accident and

arson by Robert Medina through mail fraud was stated by CSN-2 as reported in the first Tamm Affidavit, ¶ 22, September 23, 1985; that is, to protect Medina as a collector of unlawful debt and to promote the loyalty of the criminal enterprise participants. The interceptions pertaining to the mail fraud scheme made pursuant to the September 23, 1985, Order tended to corroborate that conclusion. Traitz, Jr. tells Medina on October 4, 1985, that what he did with the car put him in a bind but that he is "still my fucking guy" although it has hurt him badly. (October 24, 1985, Affidavit, ¶ 28).

Although the motive for Traitz, Jr.'s cover-up for Medina is further suggested by the pre-October 24, 1985 interceptions, that motive is unclear from an evidentiary point of view. Motive is relevant to the extent and scope of the conspiracy. The authorized interception showed that the conspiracy was expanding along with the methods to cement that cover-up including the possible obstruction of justice and the deliberate feeding of false information to Tina Collins, the Office Manager, to give to a federal grand jury concerning the "stolen" car. (Affidavit, ¶ 28).

Contrary to defendants' contentions that the mail fraud scheme was complete at this point, the intercepted communications evidence that it was continuing, had not been abandoned, and would be pursued since it appeared the "Feds" had no information about it. However, the claim had not been paid and Traitz, Jr. wanted the $15,000 insurance money for the "loss" of the car. (Affidavit, ¶ 31). Continued investigation was necessary to determine the scope, extent and participants in the mail fraud scheme which was taking on the flavor of cover-up at all

costs. Continued surveillance was appropriate to determine the reach and sources available to the possible racketeering enterprise in furtherance of the mail fraud/cover-up scheme.

4. *Gambling Business Enterprise*

On October 1, 1985, in the Business Agents' Meeting Room, business agents Richard Schoenberger, Robert Crosley and Michael Daly discuss a named individual who owes $20,000 according to Crosley. The individual is reported to have won $2700 on the Monday night football game on September 30, 1985, but lost $1800 on the over/under score. It reasonably appeared in the context of the conversation to the listener that Crosley was reading from some document that contained these figures. (Affidavit, ¶ 22).

Defendants contend that this single incident is insufficient to have warranted continuation of the interception for continuing illegal gambling activities and that it is not probable evidence of gambling business activity in any event since it is more consistent with rumor and idle chatter. These contentions miss the mark and are rejected.

Key to understanding the probable cause finding is Crosley's knowledgeable statement that the individual *owes* $20,000, not that Crosley had heard a rumor that the individual owes $20,000 somewhere else. Crosley has specific knowledge of the person's name, employer, and amounts won and lost. Further, he appeared to be reading from a ledger card or other document containing figures. This interception corroborates the averments of CSN-2 in the September 23, 1985, Affidavit that a sports betting

and illegal lottery operation was being conducted at the Roofers' Union through Harry Joseph, Michael Mangini and Stephen Traitz, Jr. The intercepted conversation formed a reasonable basis to believe that there was a gambling operation being conducted at the Union Hall based on, at least, televised football games, and involving at least seven operating persons, including Schoenberger and Daly, with bets of $4500 or more on a single game day or night, and which had probably been substantially in continuous operation at least since the commencement of the Fall football season, approximately September 1, 1985.

Defendants argue that a single intercepted conversation was so contrary to the assertions of CSN-2 of the presence of gaining operations at the Union Hall as to render CSN-2 unreliable and the October 24, 1985 surveillance Order invalid. However, the one interception does corroborate CSN-2's assertions that conversations about the gambling operations would be heard in the Business Agents' Meeting Room. The actual operations could have been carried on in some other part of the Union Hall or at a time when there was no interception pursuant to the minimization requirements of the Order.

Continuation of the interception for possible 18 U.S.C. § 1955 violations was warranted, as evidence independent of CSN-2 was adduced.

5. *Arson by Explosive*

Defendants contend that the Affidavit misstates information which formed the basis for probable cause to

believe that conversations concerning arson by explosive would be occurring in the Roofers' Union offices.

In the October 24, 1985, Affidavit, Special Agent Tamm reported that on October 3, 1985, in the Business Managers' Office, Stephen Traitz, Jr., Michael Mangini and Harry Joseph are heard discussing the fact that the Wheaton Glass Company of Vineland, New Jersey is performing work on its own roof. According to the Tamm Affidavit, Traitz, Jr. remarks that a Union contractor should be doing the work and that if Wheaton Glass does the work, he will arrange for the destruction of a yacht owned either by the principal of the company or by the company itself. Traitz is overheard saying that he will have the yacht "blown up."

A glass company in New Jersey within the jurisdiction of the Roofers' Union had formed a bogus roofing company and trained its own employees to install a roof at its facility. According to participants in the conversation, the bogus roofing company was formed to enable the glass company to purchase roofing materials for the job without raising the suspicions of the Union that non-Union roofing work was to be performed on the premises. Discussion concerning the owner of the glass company occurred and included the fact that he owned a large yacht. In discussing the yacht, Traitz stated "Oh I think we gotta . . . I smell it, I smell a torpedo." The persons present in Traitz, Jr.'s office laughed and the conversation continued. Later in the conversation, while on the telephone, Traitz, Jr. referring to the glass company, stated, "All right we're going to take a shot at them . . . I am going to take a shot at these guys."

Defendants attack the Tamm representations and characterizations as knowingly false and assert that had the court heard the actual recording of the intercepted oral communication authorization would never have issued for possible violations of 18 U.S.C. § 844, unlawful use of explosives.

I have listened to the tape and read a transcript of the conversation. Had those materials been provided in lieu of Agent Tamm's characterization "blown up" or the misquote, the authorization would still have been given.

In view of the other intercepted conversations which concerned violent conduct by Roofers' Union officials and employees against non-union contractors, the interpretation of this conversation was reasonable and not intended to mislead the court. The reference to "smelling a torpedo" could not reasonably be taken as a joke, even if parties to the conversation regarded the torpedo talk as a laughing matter. The overall situation was reasonably regarded by the FBI and the court as a serious matter of probable imminent harm which warranted surveillance.

6. *The Government Satisfied Its Obligations Under Section 2518(1)(f) as to the First and Subsequent Electronic Surveillance Applications*

The Government applied for extensions of the oral communications surveillance on October 24, 1985, November 22, 1985, and December 23, 1985. 18 U.S.C. § 2518(1)(f) requires that where the application is for an extension of an order, a statement be included setting forth the results thus far obtained from the interception

or a reasonable explanation of the failure to obtain such results.

The Applications summarized the interceptions that had occurred which were pertinent to the offenses under surveillance and which represented a continuation of illegal activity such that it was reasonable to conclude that conversations about them 1 among the interceptees would continue over the next thirty days.

There was no request in the October Application to continue surveillance as to the theft of contractors' equipment and materials and the interstate transport of those items.

The court could determine from the conversations summarized in the Application/Affidavit that the Government was not seeking a continuation on eviscerated information but rather upon fresh probable cause as to originally enumerated offenses and as to additional probable racketeering activity by the same group of actors, activities related to the operation of Local 30/30B as a criminal enterprise by a core of controllers.

The interceptions authorized by the October and subsequent Orders were premised on the interceptions obtained in the preceding thirty days as evidenced by the summary of facts in the Application/Affidavits. That core control is made out by the interceptions made in the preceding thirty days.

Nothing advanced by defendants as to section 2518(1)(f) warrants suppression of the evidence obtained through the extensions of surveillance.

Although there was no pre-October 24 interception wherein Mangini was heard to be involved in illegal gambling activity, there was interception of conversation probably related to gambling activity by three other business agents. There was probable cause to conclude that that gambling activity was authorized by the core of interceptees who appeared to be at the center of the racketeering activity. That group included Mangini.

Although no conversations were related to strong-arm tactics involving the collection of loanshark debts there was considerable discussion of strong-arm tactics by Mangini, Medina and others in collecting union debt by extortionate means. The intercepted conversations indicated that there was gambling debt owed by "Murray" and there was reason to believe that those practicing extortionate means might collect that gambling debt by like means.

The court was kept apprised of the progress of the oral interceptions by progress reports which summarized them and justified the continuation for the first thirty day period.

The weekly progress reports prepared by the United States Attorneys' Office also evidenced the need for a continuation of the surveillance after the end of the first thirty day period. The summary of interception gave probable cause to believe that Stephen Traitz, Jr., his close business agent allies, and Harry Joseph, were tied into a criminal network which, in turn, dictated or influenced Union decisions pertaining to the use of Union funds. For example, in the Third Progress Report dated October 14, 1985, Traitz, Jr. is alleged to have stated that he obtained

the permission of Nicodemo Scarfo to become the power figure in the Union after the death of the predecessor business manager and that Scarfo lived up to his end of the bargain. Further, it was alleged in the same report that interceptions evidenced that some roofing contractors sought to be exempted from the Union's 100 hour dues requirement because of their organized crime connections and that Traitz instructed Medina that they are not to pay or be slapped around because that would be communicated to him by Scarfo, that Scarfo respects the organization they have going and that Traitz had offered Scarfo help if he has trouble with the Irish boys. In the same report, Traitz and Joseph discuss the fact that Saul Kane, known gambler and allegedly associated with Scarfo, will be back in town on October 14, 1985, and they further discuss gambling junkets.

With respect to gambling junkets, Traitz, Jr. is reported to have discussed with Mangini and Medina the possibility of a "high rollers" trip to a Puerto Rico hotel/casino in the upcoming year, 1986, for eighteen (18) business agents whose expenses and salaries will be paid by the Union. Second Progress Report, October 7, 1985.

The progress reports for the first interception period show probable cause that continued surveillance is justified as the only viable means of investigation of the criminal network emerging. The reports suggest that Union funds are continuously being used to influence judges and others who preside over, or are connected with, roofers' court cases and that Traitz, Jr. wants control over a legal services fund for that purpose, and that Union funds were being used to get to the Medina case to

the right judge because Traitz, Jr. "can't lose Medina because he's my enforcer."

The progress reports kept the court apprised regularly of the need for surveillance as well as the ever increasing swirl of names commonly engaged in what reasonably appeared to be an on-going RICO criminal enterprise and the identity of the room in which the conversations took place.

7. *Normal Investigative Methods Were Reasonably Unlikely to Succeed or Be Too Dangerous*

For the same reasons articulated for issuance of the original authorization, the information obtained by the interceptions demonstrated that normal investigative techniques were not reasonably likely to succeed or would be too dangerous in learning what was transpiring within the Union Hall among the small group of persons engaged in conducting and controlling the alleged racketeering activities. Necessarily, on this occasion, the court was satisfied by the representations of Special Agent Tamm in this regard as the interception authorization was granted as requested. (*See* Tamm Affidavit, ¶¶ 39-42).

The same finding prevailed as to the subsequent authorizations. Indeed, as events unfolded, the necessity of an interception order as the only reasonably safe means of investigation became more apparent.

8. *The Minimization Language, Directives and Procedures Were Sufficient*

The minimization directives through the court's Order were sufficient to fulfill the objectives of the stat-

ute. A decision as to what was appropriate minimization depends on the facts of each case presented. Allowing investigation of the entire pattern of the criminal conspiracy is consistent with the provisions of the statute. *United States v. Vento*, 533 F.2d 838, 852 (3d Cir. 1976). "Minimization is not, to be judged by a rigid hindsight that ignores problems confronting the. officers at the time of the investigation." *Id.* at 853. The minimization directives were reasonable under the circumstances. Moreover, the court required and obtained weekly progress reports which informed it as to the minimization efforts as well as to whether continuation of the order appeared necessary.

VIII. *THE NOVEMBER 22, 1985, ORDER*

A. *The Authorization of the November 22, 1985, Application Was Valid*

18 U.S.C. § 2516(1) requires that the Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General authorize an application for interception of wire or oral communications. The November 22, 1985, application was authorized by Glenn Archer, the Assistant Attorney General In Charge of the Tax Division. By Order No. 1088-85, Attorney General Edwin Meese, III specially designated the Assistant Attorney General In Charge of the Tax Division to authorize electronic surveillance applications conditioned on the absence from the District of Columbia or unavailability of the Assistant Attorney General in charge of the Criminal Division. Defendants contend that the

November 22, 1985, application authorized by the Assistant Attorney General in charge of the Tax Division is facially insufficient.

Defendants have the initial burden of establishing a prima facie showing that the condition precedent to Mr. Archer's power to authorize the application, that the Attorney General was absent from the District of Columbia or was unavailable, has not been met. *See United States v. Jabara*, 618 F.2d 1319, 1327 (9th Cir.), *cert. denied*, 449 U.S. 856 (1980). Absent such showing, authorization orders are presumed to be proper. *Id.*; *United States v. Newman*, 733 F.2d 1395, 1399 (10th Cir. 1984); *United States v. Terry*, 702 F.2d 299, 311 (2d Cir.), *cert. denied*, 464 U.S. 992 (1983). Defendants "must offer evidence, apart from mere conjecture or speculation, to rebut this presumption." *Terry*, 702 F.2d at 311.

Defendants make no affirmative showing that the authorization is invalid. Given the presumption of facial validity of the authorization, *see United States v. Adams*, 759 F.2d 1099, 1115 (3d Cir.), cert. denied, 106 S. Ct. 336 (1985), and the absence of any showing by defendants, the Government need not demonstrate the absence or unavailability of the Attorney General. The authorization must be presumed valid.

The November 22, 1985, Order authorized the interception of oral communications of interceptees Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, James Nuzzi, Robert Medina, Robert Crosley, Joseph Traitz, Richard Schoenberger, Edward Hurst, Thomas Brown,

and others yet unknown as to offenses involving racketeering activity, extortionate credit transactions, prohibited gambling enterprises, embezzlement from pension and welfare funds, bribery, and offer, acceptance or solicitation to influence operators of employee benefits plans. The racketeering activity was alleged in the Application to include as predicate acts at least mail fraud, embezzlement of union funds, acceptance of kickbacks or fees from an employee benefit plan of extortionate collections of credit, and operation of a prohibited gambling enterprise.

Fresh probable cause was made out by the interceptions during the preceding thirty day period.

1. *Mail Fraud*

With regard to the alleged RICO charges there was a continuation of the predicate mail fraud scheme which had not yet been completed. The scheme was found to be taking on new dimensions of judicial and prosecutorial corruption in an attempt to insure that low bail would be established for Medina, that the serious criminal charges against him would be dismissed and that trial on the remaining lesser charges would be ultimately assigned to a judge who would see that Medina would be acquitted. Interwoven with the mail fraud scheme were interceptions that evidenced the use of Union funds to bribe judicial officials in an attempt to extricate Medina from the criminal quagmire of the car accident and aggravated assault on the victims of the crash.

2. *Bribery*

The racketeering also involved a generalized effort by the core leaders of the criminal enterprise to buy goodwill among certain judges of the Philadelphia Municipal Court in order to insure that Roofers' agents would get a "fair shake" in judicial proceedings involving acts of violence in connection with Union endeavors. The interceptions also revealed bribes paid to a labor squad officer of the Philadelphia Police Department to be circumspect and that probable cause existed to believe that Medina's bail commissioner knowingly set a bail of $3,000 instead of $12,000 as an accommodation to Stephen Traitz, Jr.

3. *Legal Service Fund Kickbacks*

The interceptions further reveal a continuation of the illegal plan to demand kickbacks from Herbert Fisher of fees charged against the legal service fund. Those monies will be used to make cash Christmas gifts to various judges and officials in the hope of influencing their possible future official conduct in favor of Union agents charged with criminal offenses in connection with labor activities. This is consistent with the efforts to influence the outcome of the bail and preliminary hearing and trial of the charges lodged against Medina. Party to the discussions on November 11, 1985, about monies to be distributed to judges were Michael Mangini, Harry Joseph, Richard Schoenberger, Edward Hurst, Robert Crosley and Stephen Traitz, Jr. The interception revealed that there had been a pattern of kickbacks from Herbert Fisher over the past several years. There was informational evidence

that Jack Kincade knew about the kickbacks and their illegal use by the Union to attempt to influence judges and other persons associated with the criminal justice system including court staff, and the administrative law system. Traitz, Jr. was heard to complain that he had had to go to Fisher's law firm three times in the last year to get all the money that was due from the kickback. There was disagreement among the parties to the November 11, 1985, conversation as to whether the percentage of the kickback to be demanded in the year would be ten percent or more. Mangini has accompanied Traitz, Jr. to Fisher's office in the past to collect the kickback.

The interceptions also demonstrated that the Business Manager, Traitz, Jr. actually controlled the legal service fund and other trust funds of which Edward Hurst was the official administrator. Within these interceptions there was evidence of continuing violations of 18 U.S.C. §§ 894, 1954, and 1962(c), and 29 U.S.C. § 501(c).

It is clear from the interceptions that one of the consistent purposes of the criminal enterprise is to control persons within the criminal justice system to protect the enterprise from detection and criminal prosecution in order to promote the operation of the Union as a private criminal club using trust funds. The breadth of this illegal purpose even reached the New Jersey Department of Commerce according to a November 7, 1985, interception involving James Nuzzi and Stephen Traitz, Jr. wherein a plan is devised to give a free roof to the commerce official, but only after gaining the approval of the Sheriff of Camden, New Jersey.

4. *Extortionate Collection of Extensions of Credit*

The connection between the payments to public officials and other enumerated acts of the criminal enterprise is evidenced by an interception of October 31, 1985, wherein Robert Medina, Richard Schoenberger and Joseph Kincade confront a roofing contractor who has not complied with the demand of the Union that owners of a Roofers' 30B roofing operation pay $130 a month. Kincade tells the contractor that he had been turned into them by a Philadelphia City inspector for working several city jobs during the past year. The contractor is physically assaulted by Schoenberger and verbally assaulted by Medina. The contractor is threatened. He is told that unless he complies with the Union's demands he will have even more trouble.

The ability of business agents to threaten and commit violence with impunity is evidenced further by a November 7, 1985, interception involving Robert Crosley, Buddy Osborne and Robert Medina. An individual is accused of working "under the table" for a certain roofing contractor. Crosley gives the individual "the back of his hand." It is probable that the perceived impunity is related to the business agent's belief that the criminal justice system has been and will continue to be bought off by the Union.

The reach of the criminal enterprise into the administrative law system to enforce its control over contractors through fear and intimidation and to protect its members from sanctions for their illegal extortionate activities is evidenced by a conversation on November 11, 1985, involving Stephen Traitz, Jr., Robert Crosley, Edward Hurst, Michael Mangini and Michael Daly, business

agent. Traitz, Jr. discusses bringing a Philadelphia Licenses and Inspections Department inspector to a planned Christmas party on December 23, 1985, who will be "taken care of." There is also discussion of bringing a federal inspector to the same party who likewise will be "taken care of." In the same discussion, Traitz, Jr. states that his son only wants to come to work as a business agent when there is someone to beat up.

The tie-in between violence with impunity by business agents and bribes of public officials is apparent and probable cause existed to authorize the oral interception for the RICO charges as alleged in the Application.

From the above summarized interceptions, there was probable cause as to the predicate acts of mail fraud, extortionate collection of credit, defrauding and embezzling funds from the legal service fund of the Union, bribery, and solicitation to influence operations of an employee pension plan.

5. *Embezzlement from Pension and Welfare Funds*

On November 7, 1985, according to the Application/Affidavit in the Business Manager's Office, Stephen Traitz, Jr. tells Robert Crosley, Michael Daly, Joseph Traitz, and Stephen Traitz, III that a New Jersey roofing contractor who was forgiven $150,000 in dues and benefits by Roofers' Local 30 because a "mutual friend" is being "fined" $50,000 by the organized crime family of Nicodemo Scarfo because the contractor let it be known he had a relationship with Scarfo. This conversation added to the scope of the embezzlement of union funds investigation. It identified the person or organization for

whom Traitz, Jr. through control of the pension and welfare funds, agreed to forgive the contractor's indebtedness and simultaneously to obligate the funds for the monetary expectation of the Union workers. The connection between the Business Manager of the Union and an organized crime family, impacting upon ERISA trust funds, and the union reporting requirements of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-530, further supported probable cause to the RICO charges as alleged.

6. *Section 1962(c) and Section 1955*

On the same day, November 7, 1985, Harry Joseph, who is reported by Special Agent Tamm as closely associated with Nicodemo Scarfo (Affidavit, ¶ 9), has a conversation with Stephen Traitz, Jr. in the Business Manager's Office. Traitz, Jr. advises that he is in the process of working out a "sit down" to work out a gambling debt of $15,000 owed by Richard Kincade, a member of Local 30, to persons associated with Nicodemo Scarfo who ran a blackjack game at a country club. Saul Kane, who is similarly associated and who has a prosecution record of gambling and loansharking (Affidavit, ¶ 9), has visited with Traitz, Jr. (Affidavit, ¶ 36, 60). It was a meeting that Harry Joseph set up to try to work out the collection of the gambling debt. Traitz, Jr. has assured Kincade that "You're my guy and they can't bother you unless they come through me." (Affidavit, p. 56). This conversation evidences Traitz, Jr's use of his office, and the use of the criminal enterprise, for the collection of the unlawful debt and his conspiracy in collection of that debt by extortionate means. Traitz, Jr. says to Kincade

> They were gonna see you. I said no, you let me see him first, and then before, before you know. Before anything comes down please come see me. I don't want anything to happen to you. . . .
>
> * * *
>
> Let me take care of that. You're my fucking guy. I told him, hey if you hurt him you're hurting me. They said that's why we're here. I said, yo, please, I said he's gonna do the right thing. We'll get a sit down, I hope that's what you wanted, let me handle it . . .
>
> * * *
>
> Yo, I'm gonna sit down with you there. I'll be with you, I'm gonna be with you. When they call you down I'm gonna be with you . . .
>
> * * *
>
> Rip, hold it Rip, I'm involved.

(Affidavit, pp. 57-59).

The conversation evidences the involvement of Traitz, Jr. in the collection of gambling debt for members of the Scarfo organization who are prepared to use extortionate means to obtain collection. Further, it evidences the probability that Traitz, Jr. is routinely involved in the collection of debt for an organized crime gambling operation that involves Scarfo, Kane, Jake Lamotta who came looking for Kincade, the two Scarfo associates who ran the blackjack game, Harry Joseph and Stephen Traitz, Jr. and that grosses $15,000 on a single occasion from Kincade. Further, it can be reasonably inferred from the organized crime interest in the collection that the gambling operation had been in effect substantially and continuously for a period in excess of thirty days. Hence, there was fresh probable cause for the substantive § 1955 offense.

The probability that the other interceptees were involved in the conspiracy associated with the Scarfo gambling business interests arises from the conversations in which they participated about the connection between Local 30 and the organized crime family of Nicodemo Scarfo (Affidavit, ¶ 37, 38), and conversations about diversion of monies from the Union trust fund accounts or employee benefit plans. (Affidavit, ¶ 34). The interceptions showed that one of the connections between the Scarfo organization and Local 30 was the immunity of mutually friendly contractors from collection of monies owed to the Union employee benefit plans. The "immunity" from a debt of $150,000 owed to the Union was something likely known and chargeable to the Union plan administrator and the board of directors which apparently included Traitz, Jr., Crosley and Mangini. (Affidavit, ¶ 41, p. 63).

B. *Defendants Herbert K. Fisher and Herman Bloom Properly Are Not Identified As Interceptees In The November 22, 1985, Interception Order and Application*

Herbert K. Fisher and Herman Bloom were intercepted on November 21, 1985, at approximately 4:00 p.m. in the Business Manager's office at the Roofer's Union engaging in a conversation with Stephen Traitz, Jr. concerning the kickback to Union officials of ten percent of the fees paid to the law firm of Bloom, Ocks and Fisher by the Roofer's Union Prepaid Legal Fund. The November 22, 1985, Order and Application listed the kickback and embezzlement offenses under investigation but the order did not list Fisher or Bloom as named interceptees.

Defendants contend that the failure to name Fisher and Bloom as interceptees violated 18 U.S.C. §§ 2518(1)(b)(iv), (3)(d) and (4)(A) requiring that persons believed to be committing the named offenses at the location where interception will occur be listed in the Order and Application and, therefore, the documents are facially insufficient. Suppression is unwarranted.

United States v. Donovan, 429 U.S. 414, 428 (1977) held that "a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone." Failure to identify an individual so situated, however, does not warrant suppression. *Id.* at 439.

At the time the Order was executed and the Application presented there was no reason to believe that Bloom and Fisher would come to the Roofer's Union offices during the thirty days to follow and engage in discussions about kickback. Although there was talk by Traitz, Jr. about what he was going to do or would like to do after gaining control over the legal service fund, complicity of the attorneys was not confirmed. Neither Bloom nor Fisher maintained offices at the Union and neither was present at the Union from the inception of surveillance. Although there was probable cause to believe that Fisher and Bloom would be violating federal criminal law in the future and had violated the law in the past, no evidence connected their conduct to the Union offices. In the November 11, 1985, conversation reported in the electronic surveillance affidavit concerning the embezzlement/kickback scheme, the participants stated that they would be travelling to the offices of Bloom, Ocks and

Fisher to communicate the kickback figure and obtain the money. (*See* November 22, 1985 Affidavit ¶ 31). Therefore, there was no reason to believe that any communications of Fisher or Bloom would be intercepted at the Roofer's Union offices.

The application for an extension order to intercept communications for an additional thirty days was presented to the court during the morning of November 22, 1985. According to the Government, the Assistant United States Attorney and Special Agent Tamm were not aware of a November 21, 1985, Bloom/Fisher conversation occurring at the Union offices at the time the extension application was presented to the court. (*See* Tamm Affidavit).

Finally, the names of Fisher and Bloom were mentioned in the electronic surveillance Affidavit and the criminal activity of which they were suspected was discussed. Accordingly, Title III's goal of identifying the purpose and objects of the investigation with particularity were satisfied. *See United States v. Johnson*, 539 F.2d 181, 191 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); *United States v. Cantu*, 625 F. Supp. 656, 674 (N.D. Fla. 1985), *aff'd mem.*, 791 F.2d 940 (11th Cir. 1986). In any event, failure to identify an interceptee under these circumstances does not warrant suppression. *See United States v. Donovan*, 429 U.S. at 439.

IX. *DECEMBER 23, 1985, ORDER*

A. *Probable Cause*

1. *The Mail Fraud-Bribery-Embezzlement of Union Funds*

The mail fraud scheme continued with the added dimensions of bribe attempts by Stephen Traitz, Jr. and

other agents of Local 30/30B of the trial judge then assigned to the Medina case (Affidavit, ¶¶ 22-26) as evidenced by interceptions on November 26, 1985.

2. *Kickbacks-Bribery-29 U.S.C. § 501(c) Violations*

The scheme to "wack" the legal fund fee of the Herbert Fisher law firm for purposes of giving money to public officials is shown to be continuing. An interception on November 27, 1985, showed Traitz, Jr. and Mangini planning to go to Fisher's office to collect the kickback from the legal service fund. On December 3, 1985, Traitz, Jr. shows Fisher a list of judges of the Philadelphia Court of Common Pleas and Municipal Court who are to receive Christmas envelopes and who will be invited to a Christmas party given by Local 30. Fisher gives Traitz, Jr. $5,000 which is to be used to fill the envelopes.

It is clear that the intent of the gifts is to influence the judges in cases that may be before them or come before them in the future, involving Local 30 or friends of the Traitz, Jr. criminal enterprise. There is more money expected of Fisher which is promised to be forthcoming on Monday, December 9, 1985. After Fisher leaves, Traitz, Jr., Crosley, Mangini and Tina Collins, the Office Manager, discuss the procedures to fill the envelopes with money that will be given to judges and other public officials and employees.

On December 6, 1985, Traitz, Jr. and Thomas F. Brown discuss a coding system for the envelopes to avoid detection of the list and the fact that gifts were given. Brown is to make the deliveries. On December 9, 1985, Mangini

and Robert Crosley report that an additional $5,000 has been obtained from Fisher.

On December 11, 1985, Brown and Traitz, Jr. discuss the distribution of envelopes to judges and to several Philadelphia Assistant District Attorneys to "fix" several cases by placing them in a pretrial diversion program for which they would not qualify because of prior convictions.

On December 11, 1985, Traitz, Jr. states that he has arranged through court staff for Medina's case to be reassigned from Judge Knauer, who appears to him afraid to throw the charges out completely because of an apparent FBI investigation, to the court of Judge Mary Rose Cunningham. (Affidavit, ¶¶ 25, 26, 51, 52). On December 18, 1985, Traitz, Jr. meets with Judge Cunningham for the purpose of giving her money and offering her favors so that she will be one of the judges the Union can depend upon to be "fair" whenever cases involving persons connected with the Union or Traitz, Jr. came before the court.

The kickback scheme from the legal service fund is shown by the interceptions during the preceding thirty days to be directly connected with the attempt by the interceptees to gain judicial and public official favors by giving Christmas gifts and a Christmas party for them illegally using Union employee benefit funds to do so. (Affidavit, ¶¶ 33, 34, 35, 36, 46, 48, 49, 56).

Continuation of the interception was warranted to determine the parameters of the scheme and the participants. The scheme was hardly completed. The interceptions showed that its tentacles were continually reaching and expanding into additional connected ventures.

3. *Bribery-Embezzlement From Pension and Welfare and 1962(c) Violations*

The tentacles of the illegal use of Union funds to attempt to buy off public officials to mask violent criminal conduct by Union officials and agents reached New Jersey, specifically to the Camden County Sheriff's Office. This was illustrated by the inclusion of the Sheriff and his chief deputy in the Christmas list and Christmas party, and by favors expected of him in attempting to quash pending charges of criminal assault of a police officer against James Nuzzi, business agent. (Affidavit, ¶¶ 56, 55, 51, 50, 37, 32, 31, 28). The interceptions demonstrate the Sheriff's attempts to "tone down" the charges and the consternation of Traitz, Jr., Nuzzi and the other participants when the Sheriff is unable to get the charges dropped. Traitz, Jr. commits himself to doing whatever he can do to fight the Nuzzi charges because otherwise, "Nuzzi will lose his job." (Affidavit, ¶¶ 28, 47). Some of his attempts to get that help are summarized in paragraph 50 of the Affidavit. They include getting an attorney for his defense using Union funds and promises of transferring all the Union legal business to that attorney even though the assault by Nuzzi occurred in a cocktail lounge in Gloucester County and was unrelated to Union business. This was further probable evidence of taking union money for private use, that is, embezzlement of union funds.

4. *Extortionate Collection of Extensions of Credit*

The apparent license to commit violence is directly related by probability to the extensive network of pay-

ments funded by kickbacks to public officials to fix criminal cases, thereby engendering faith in the assailants that they can operate through violence with impunity, and hopelessness in the victims to resort to the justice system. The pattern of violence with impunity is further illustrated by an interception on December 10, 1985, where Traitz, Jr. directs that a business agent of the Carpenters District Council be beaten up to teach him a lesson not to disregard a "deal" that was negotiated by Harry Joseph for a friend of his which involved a breach of the Carpenters' collective bargaining agreement. The direct connection between the kickback network and Union violence is shown in an interception of December 3, 1985, wherein during the filling of Christmas envelopes Mangini tells Traitz, Jr. of a problem with a roofing contractor and Traitz, Jr. directs Mangini that the individual should be slapped in the mouth, then kicked out of the Union. (Affidavit, ¶ 35). The on-going protection desired for the criminal enterprise is the probable explanation for the urgency with which the kickbacks from the Herbert Fisher law firm were pursued and the Christmas envelopes filled and distributed. The influence of the kickback scheme also reached the Civil Service Commission and Graterford Prison. (Affidavit, ¶¶ 38, 42, 54).

The expansiveness of the scheme justified continuation of the oral communications interception to determine its scope, influence, participants and victims as to the RICO offenses alleged, the substantive offenses of 18 U.S.C. § 1954 (offer and acceptance of gifts, kickbacks or fees from an employee benefit plan and bribery and conspiracy therewith); 29 U.S.C. § 501(c) (embezzlement of Union funds); 18 U.S.C. § 1341 (mail fraud); and 18

U.S.C. § 664 (embezzlement from welfare and pension funds of a labor organization).

The RICO offenses numbered more than two and included the foregoing substantive offenses and mail fraud, 18 U.S.C. § 1341, and therefore justified interception of all of the racketeering activities of the criminal enterprise, even if the substantive offenses of collections of credit by extortionate means and gambling business enterprise were not made out by probable cause as substantive offenses since they had been previously shown by other interceptions to be part of the activities of a continuing criminal enterprise.

Yet, there was fresh evidence of these offenses as substantive evidence.

5. *Extortionate Collection of Unlawful Debt*

On December 10, 1985, Stephen Traitz, Jr. met in the Business Manager's office with "Tommy" and Marvin Rothstein. The subject of the conversation was Rothstein's request that Traitz assist him in collecting a million dollar loan owed by Jay Henley, which consists of $200,000 in principal and $800,000 in "juice," a term probably referencing interest charged on gambling and usurious debt. Traitz assures Rothstein that "we will retrieve your money" and further states that he will discuss the situation with Saul Kane the next day who will also bring "Little Nicky" Scarfo into the collection process. There is probable cause that Traitz, Jr. will utilize extortionate means to collect the debt from Henley, given the pattern of violence used in carrying out matters within the purview of the Union. Further, Traitz, Jr. promises that he

will employ organized crime connections to insure the collection process.

On December 10, 1985, Traitz, Jr. states that he has a relationship with Alfonse Parissi. Traitz, Kane, Harry Joseph and Parissi arrange a meeting for the next day with Johnny Arena, an old time gambler from the Norristown area, who is being brought to the meeting by Howard Hurst, a business agent of Plumbers Local Union 690. Arena apparently owes a gambling debt to Parissi. The meeting is to take place at a Philadelphia restaurant. The Traitz, Jr./Parissi meeting involves collection of gambling debts. This is further bolstered by the December 10, 1985, conversation wherein Traitz tells Harry Joseph that he will arrange to have a private room available so that Saul Kane and Arena can talk, and that he does not want to get involved in the collection from Arena. (Affidavit, ¶ 40). Arranging the room and meeting is evidence of participation in a conspiracy to collect the Arena gambling debt.

On December 9, 1985, an unidentified male told Traitz, Jr. that Harry Joseph had told him that he would collect $13,000 from an individual but that he had not heard from Joseph. Traitz told the individual not to worry because Saul Kane was back.

The probable cause for the substantive offense of collection of extensions of credit by extortionate means is established by the evidence of collections of the gambling debts mentioned in the interceptions with the assistance of Saul Kane. He had threatened harm to Kincade to collect a gambling debt. By inference, his involvement represented extortionate muscle in the collection process, a process in which interceptees were participants and co-

conspirators. 18 U.S.C. § 894. *See, United States v. Gigante*, 729 F.2d 78 (2d Cir.), *cert. denied*, 467 U.S. 1206 (1984).

Based on the interceptions made pursuant to the October, 1985 Order, it was evident that Saul Kane and Traitz, Jr. were involved in the Kincaid gambling debt collection. It is equally evident from the December Order interceptions that there was a substantially continuous gambling business which generated collectable gambling debts and which had been in business for a period in excess of thirty days. It involved at least five persons, Traitz, Jr., Kane, Joseph, Scarfo, Alfonse Parissi and Lamotta, and possibly Howard Hurst, in the conduct of the collection part of the gambling business. *See* 18 U.S.C. § 1955.

On December 18, 1985 Traitz engages in the collection of a gambling debt owed by Charles Murtaugh, Business Agent, to Alfonse Parissi. He tells Murtaugh to pay the debt owed Parissi, that he is "gonna see those guys tomorrow and they'll probably tell me about that." (Affidavit, ¶ 58).

On December 18, 1985, Traitz, Jr. states that he has been invited to the Nicky Scarfo Christmas party set for the next day along with Joseph Traitz, Stephen Traitz, III, Michael Mangini and Richard Schoenberger and that he has business to discuss with the people who invited them. This invitation is evidence of Traitz, Jr.'s confidence in these individuals to respect his business relationship with the Scarfo organization of collecting gambling debt and to aid that relationship. When asked by Schoenberger why Robert Crosley was not invited, Traitz, Jr. replies "they don't know him and they don't make new friends,"

suggesting that those invited were known and were friends.

There was probable cause to believe under the circumstances that the business for discussion that the invitees brought to the party included an extensive network of corrupt criminal justice system influence and protection purchased with kickbacks from employee benefit plan funds. *See* 18 U.S.C. § 1962(c) and (d); 18 U.S.C. § 1954.

X. *THE JANUARY 22, 1986, ORDER*

A. *Probable Cause*

1. *The Kickback Scheme-Bribery-Extortionate Collection*

The kickback scheme involving the legal service fund and the plan administrators is continuing and it takes on added dimension, according to the interceptions of the preceeding thirty days. Herbert Fisher is being threatened by Mangini, according to a December 31, 1985, interception, for not kicking back a portion of his fee to Local 30 members who are plaintiffs in civil cases handled under the legal services plan. (Affidavit, ¶¶ 34, 35). The bribery and attempted bribery of judges and other public officials with legal service fund kickbacks and the effects thereof is shown to be continuing. The Medina case has been caused to be reassigned by Traitz, Jr. from Judge Knauer to Judge Cunningham, described by Traitz as one of "his judges," for trial on January 27, 1986. The hoped for acquittal of Medina is tied to the success of the mail fraud scheme as perceived by Traitz, Jr. and associates. Further, the attempted bribery scheme is shown to

include other named judges and public officials (Affidavit, ¶¶ 27, 28, 29, 30, 31) before whom there are pending cases involving Roofers' members. *See,* 18 U.S.C. §§ 1962, 1954; 29 U.S.C. § 501.

2. *Sections 1955 and 894*

With respect to the relationship with Saul Kane, the December 27, 1985, interception involved discussions between Harry Joseph and Traitz, Jr. about a list of things Kane wants Traitz to do. (Affidavit, ¶ 32). This conversation occurred in the Business Manager's Office. There was probable cause to believe that the list pertained to the collection of gambling debts for gambling business operated by organized crime. 18 U.S.C. §§ 1962, 664, 894.

Further, with respect to the substantive offense under 18 U.S.C. § 894, collection of extension of credit by extortionate means, there are threats to Herbert Fisher by Mangini respecting kickbacks.

The demand that principals of roofing companies pay $100 a month in dues whether they worked or not is continuing under threat that physical force would be employed by Local 30 if there was a failure to comply. *See,* Fifteenth Progress Report dated January 13, 1986, summarizing January 7-8 interceptions, ¶ B. The contractors called into the Union Hall for delinquencies in dues or obligations under their labor agreement continue to act under the apprehension of fear of physical force from Local 30/30B Business Agents. (Affidavit, ¶ 40).

This conduct appeared to continue despite admonitions by Stephen Traitz, Jr. to business agents to stop beating up roofing contractors in the Business Agent's

Meeting Room or otherwise engaging in criminal activity following discovery of what was believed to be a FBI electronic eavesdropping device in that room on December 30, 1985. There was reason to believe that such admonitions were not sincere but were being made in anticipation of interception.

XI. *SUMMARY*

As of January 22, 1986, through the interceptees and others affiliated with them, there was probable cause to believe that there were in place, and continuing, several concurrent, interwoven illegal schemes, each violative of one or more of the criminal statutes which formed the basis for the interceptions. This conduct, apparent from the interceptions to be probable violations of the law was being committed by knowing participants perpetuating the RICO criminal enterprise alleged by the Government. That enterprise abused powers granted to the Roofers Union under federal law and misappropriated trust funds committed to the Union's care and administration, to gain license, through the purchase of judicial and political influence, to intimidate and control persons through the use and threat of physical force and violence for the personal gain and advantage of the core participants. Those persons were reasonably shown by the interceptions, and information provided by CSN-1 and CSN-2, to be the interceptees authorized by the Orders.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1048, 1049, 1050, 1055, 1056,
1057, 1058, 1059, 1071, 1152,
1153, 1154, 1155

UNITED STATES OF AMERICA

v.

STEPHEN TRAITZ, JR.

Stephen Traitz Jr.,
Appellant in No. 88-1048

Robert Crosley,
Appellant in No. 88-1049

Michael Daly,
Appellant in No. 88-1050

Michael Mangini,
Appellant in No. 88-1055

Mark "Buddy" Osborn,
Appellant in No. 88-1056

Stephen Traitz, III,
Appellant in No. 88-1057

Joseph Traitz,
Appellant in No. 88-1058

Richard Shoenberger,
Appellant in No. 88-1059

Robert Medina,
Appellant in No. 88-1071

Daniel J. Cannon,
Appellant in No. 88-1152

Ernest Williams,
Appellant in No. 88-1153

Edward Hurst,
Appellant in No. 88-1154

James Nuzzi,
Appellant in No. 88-1155

Appeal from the United States District
Court for the Eastern District
of Pennsylvania

District Court
Criminal Nos. 86-00451-01-13

Present: GIBBONS, *Chief Judge*, SEITZ, *Circuit Judge* and FARNAN *District Judge**

J U D G M E N T

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel September 29, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered January 28, 1988 in D.C. Criminal Nos. 86-00451-01, 86-00451-03, 86-00451-04, 86-00451-05, 86-00451-07, 886-00451-08, 86-00451-11, 86-00451-12 and

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* Hon. Joseph J. Farnan, Jr., United States District Judge for the District of Delaware, sitting by designation.

86-00451-13 and entered March 8, 1988 in D.C.Criminal Nos. 86-00451-02, 86-00451-06, 86-00451-09 and 86-00451-10, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

March 22, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1048, 88-1049, 88-1050
88-1055, 88-1056, 88-1057
88-1058, 88-1059, 88-1153
88-1154, 88-1155

UNITED STATES OF AMERICA

v.

STEPHEN TRAITZ, JR., et al.

STEPHEN TRAITZ. JR.- Appellant No. 88-1048
ROBERT CROSLEY- Appellant in No. 88-1049
MICHAEL DALY- Appellant in No. 88-1050
MICHAEL MANGINI- Appellant in No. 88-1055
MARK OSBORN- Appellant in No. 88-1056
STEPHEN TRAITZ, III- Appellant in No. 88-1057
JOSEPH TRAITZ- Appellant in No. 88-1058
RICHARD SCHOENBERGER-Appellant in No. 88-1059
ERNEST WILLIAMS- Appellant in No. 88-1153
EDWARD P. HURST- Appellant in No. 88-1154
JAMES NUZZI- Appellant in No. 88-1155

(Criminal Nos. 86-00451-01-13 - E.D.Pa.)

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, COWEN, NYGAARD, *Circuit Judges*, and FARNAN, *District Judge.**

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and treating the petition as timely, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

/s/ C.J. Seitz
Circuit Judge

DATED: APR 21 1989

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*Honorable Joseph J. Farnan, Jr., United States District Judge for the District of Delaware, sitting by designation.

Title 18, United States Code:

§ 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has

been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that–

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify–

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon

request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days, Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception

of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that–

(a) an emergency situation exists that involves–

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately

upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be

served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of–

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was

not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that–

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if–

(a) in the case of an application with respect to the interception of an oral communication–

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication–

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(iii) the judge finds that such purpose has been adequately shown.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11) shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously.